

✓

United States
Circuit Court of Appeals
For the Ninth Circuit.

FAIRBANKS, MORSE & CO., a Corporation,
Appellant,

vs.

LAKE UNION DRY DOCK & MACHINE
WORKS, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

FILED

DEC 4 - 1928

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

FAIRBANKS, MORSE & CO., a Corporation,
Appellant,

vs.

LAKE UNION DRY DOCK & MACHINE
WORKS, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	7
Appeal and Supersedeas Bond	86
Assignments of Error	83
Bill of Exceptions	12
Certificate of Clerk U. S. District Court to Transcript of Record	89
Citation	91
Complaint	1
Excerpts from Docket Entries	7

EXHIBITS:

Plaintiff's Exhibit No. 1—Letter Dated April 6, 1927, Sterling Steamship Cor- poration to Lake Union Dry Dock & Machine Works	54
Plaintiff's Exhibit No. 2—Contract Dated October 14, 1926, Between Lake Union Dry Dock & Machine Works and Ster- ling Steamship Company	56
Plaintiff's Exhibit No. 3—Letter Dated May 19, 1927, Fairbanks, Morse & Co. to Lake Union Dry Dock & Machine Works	57

	Index.	Page
EXHIBITS—Continued:		
Plaintiff's Exhibit No. 4—Letter Dated May 20, 1927, Bronson, Jones & Bronson to Fairbanks, Morse & Com- pany		58
Plaintiff's Exhibit No. 5—Trade Accept- ance Dated June 2, 1927		59
Plaintiff's Exhibit No. 6—Letter Dated June 2, 1927, Lake Union Dry Dock & Machine Works to First National Bank of Seattle		60
Plaintiff's Exhibit No. 7—Assignment of Claim of Lake Union Dry Dock & Machine Works to Fairbanks, Morse & Company		61
Plaintiff's Exhibit No. 8—Telegram Dated June 1, 1927, A. W. Thompson to C. R. Miller		62
Plaintiff's Exhibit No. 9—Letter Dated May 21, 1927, C. R. Miller to A. W. Thompson		63
Plaintiff's Exhibit No. 10—Telegram Dated June 1, 1927, A. W. Thomp- son to C. R. Miller		66
Plaintiff's Exhibit No. 11—Telegram Dated June 15, 1927, Insurance De- partment at Chicago, Ill., to W. R. Kuppler		67
Plaintiff's Exhibit No. 12—Telegram		

EXHIBITS—Continued:

Dated June 21, 1927, Fairbanks, Morse & Company to F. C. Dierks...	67
Plaintiff's Exhibit No. 13—Telegram Dated June 22, 1927, C. R. Miller to A. W. Thompson	68
Defendant's Exhibit "A-1"—Excerpt from By-laws of Fairbanks, Morse & Company Adopted March 26, 1924..	69
Defendant's Exhibit "A-2"—Letter Dated June 2, 1927, Fairbanks, Morse & Company to F. C. Dierks..	70
Defendant's Exhibit "A-4"—Letter Dated July 7, 1927, Cosgrove & Ter- hune to Lake Union Dry Dock & Ma- chine Works and First National Bank	79
Hearing on Defendant's Motion for New Trial	12
Judgment	11
Names and Addresses of Counsel	1
Order of Removal	5
Petition for Allowance of Appeal and Order Fixing Appeal and Supersedeas Bond....	82
Praeipice for Transcript of Record	88
Stipulation Waiving Trial by Jury	10
TESTIMONY ON BEHALF OF PLAIN- TIF:	
CUTTING, OTIS	35
Cross-examination	36
JONES, H. B.	12

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TIFF—Continued:		
	Cross-examination	20
	Recalled in Rebuttal	52
KUPLER, WALTER R.		24
	Cross-examination	28
	Recalled—Cross-examination	43
	Redirect Examination	43
	Recalled in Rebuttal	53
McLEAN, J. L.		31
	Cross-examination	34
SANDERSON, HARRY R.		37
SMITH, WILLIAM J.		36
TESTIMONY ON BEHALF OF DEFEND-		
ANT:		
ANDERSON, HERMA		51
	Cross-examination	51
BOUGHEY, A. W.		37
MILLER, C. R.		43
	Cross-examination	50
PHILBRICK, C. A.		41

NAMES AND ADDRESSES OF COUNSEL.

Messrs. COSGROVE & TERHUNE, 2001 L. C.
Smith Building, Seattle, Washington,
Attorneys for Appellant.

Messrs. BRONSON, JONES & BRONSON, 614
Colman Building, Seattle, Washington,
Attorneys for Appellee. [1*]

In the Superior Court of the State of Washington
for King County.

11,940.

No. 203,483.

LAKE UNION DRY DOCK & MACHINE
WORKS, a Corporation,

Plaintiff,

vs.

FAIRBANKS, MORSE & CO., a Corporation,
Defendant.

COMPLAINT.

Comes now the plaintiff and complains of the de-
fendant, and for cause of action alleges, as follows:

I.

That the plaintiff is a corporation organized and
existing under the laws of the State of Washington

*Page-number appearing at the foot of page of original certified
Transcript of Record.

and has paid its annual license fee to the State of Washington last due.

II.

That the defendant is a corporation organized under the laws of the State of Illinois, having an office for the transaction of and carrying on business at the City of Seattle, King County, Washington.

III.

That on or about the 2d day of June, 1927, for a valuable consideration, the defendant made, executed and delivered to the plaintiff a certain negotiable instrument, denominated a trade acceptance, in words and figures as follows, to wit:

No. _____.

Date June 2, 1927.

\$8000.00

266.66

8266.66

On Sept. 20, 1927, pay to the order of the undersigned EIGHT THOUSAND AND NO/100, together with six per cent interest from March 1, 1927, amounting to \$266.66.

Value received and charge the same to the account of [2]

LAKE UNION DRY DOCK & MACHINE
WORKS,

By OTIS CUTTING,

Treasurer.

H. B. JONES,

Secretary.

To Fairbanks, Morse & Company
Seattle, Washington.

Accepted June 2, 1927.

Payable at First National Bank of Seattle.

FAIRBANKS, MORSE & COMPANY.

By C. R. MILLER,
Agent.

IV.

That said instrument was thereafter, on or about the 3d day of June, 1927, discounted by the plaintiff with, and duly negotiated by it by endorsement to, the First National Bank of Seattle.

V.

That thereafter the said First National Bank of Seattle, being the owner and holder thereof, did on September 20, 1927, duly present said trade acceptance for payment, and payment thereof was by the defendant refused, and the said First National Bank of Seattle did thereupon cause said trade acceptance to be duly protested for nonpayment, and caused notice of such nonpayment and protest to be given to this plaintiff and demanded of this plaintiff, as endorser, payment on account thereof, and that plaintiff was thereupon compelled to and did pay to the said First National Bank of Seattle the amount of said trade acceptance, and thereupon became and now is the owner and holder thereof.

VI.

That the defendant herein refuses to pay said trade acceptance to the damage of this plaintiff in the sum of Eight Thousand Two Hundred Sixty-

six and 66/100 Dollars (\$8,266.66), together with interest thereon from and after September 20, 1927, at the rate of six per cent (6%) per annum. [3]

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Eight Thousand Two Hundred Sixty-six and 66/100 Dollars (\$8,266.66) and interest at six per cent (6%) per annum from and after September 20, 1927, together with its costs and disbursements herein.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

H. B. Jones, being first duly sworn, on oath deposes and says:

That he is Secretary of Lake Union Dry Dock & Machine Works, a corporation, and one of the attorneys for the said corporation, plaintiff above named; that he makes this verification for and on its behalf and is duly authorized so to do; that he has read the above and foregoing complaint, knows the contents thereof and believes the same to be true.

H. B. JONES.

Subscribed and sworn to before me this 23d day of September, 1927.

E. W. PARKS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in the County Clerk's Office, King County, Wash., Sep. 28, 1927. Abe N. Olson, Clerk. By S. R. Battenfield, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 24, 1927. Ed. M. Lakin, Clerk. By S. Cook, Deputy. [4]

In the Superior Court of the State of Washington,
for King County.

No. 203,483.

LAKE UNION DRY DOCK & MACHINE
WORKS, a Corporation,

Plaintiff,

vs.

FAIRBANKS, MORSE & CO., a Corporation,
Defendant.

ORDER OF REMOVAL.

This cause coming regularly on for hearing before the undersigned Judge, on the petition and bond of defendant herein for an order transferring this cause to the United States District Court, for the Western District of Washington, Northern Division, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned, with good and sufficient surety as provided by law, and that defendant has

given plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to said District Court:

NOW, THEREFORE, said petition and bond are hereby accepted, and IT IS HEREBY ORDERED AND ADJUDGED that this cause be, and it hereby is removed to the United States District Court for the Western District of Washington, Northern Division, and the Clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 14th day of October, 1927.

JOHN A. FRATER,

Judge.

Filed in County Clerk's Office, King County, Wash., Oct. 14, 1927. Abe N. Olson, Clerk. By A. L. Lawrence, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 24, 1927. Ed. M. Lakin, Clerk. By S. Cook, Deputy. [4A]

In the United States District Court for the Western District of Washington, Northern Division.

No. 11,940.

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,

Plaintiff,

vs.

FAIRBANKS, MORSE & CO., a Corporation, Defendant.

EXCERPTS FROM DOCKET ENTRIES.
FILINGS—PROCEEDINGS.

Oct. 24, 1927. Filed transcript on removal (King County) embracing bond, complaint, notice of petition, order of removal, petition for removal, and summons.

* * * * *

Oct. 5, 1928. Filed defendant's motion for new trial.

* * * * *

[5]



[Title of Court and Cause.]

ANSWER.

Comes now the above-named defendant and answering plaintiff's complaint, denies and alleges:

I.

Answering Paragraph III of said complaint, said

defendant denies each and every allegation therein contained; and alleges that if any such document was executed, that the said C. R. Miller, named in said purported document as agent of defendant, had no authority or right to make, execute and deliver or to accept said document, for or on behalf of the defendant, Fairbanks, Morse & Co. Defendant further alleges that if said document was so executed by the said C. R. Miller, it was without the knowledge or consent of the defendant.

II.

Answering Paragraph IV of said complaint, said defendant denies that it has sufficient knowledge or belief as to the truth or falsity of the allegations therein contained, and therefore denies each and every one thereof.

III.

Answering Paragraph V of said complaint, said defendant admits that on or about the 20th of September, 1927, said [6] First National Bank of Seattle did present to the defendant a purported trade acceptance, which the said defendant refused to pay; but defendant denies each and every other allegation in said paragraph contained.

IV.

Answering Paragraph VI of said complaint, said defendant admits that it refuses to pay said purported trade acceptance, but denies each and every other allegation in said paragraph contained.

WHEREFORE, defendant, having answered, prays that said action be dismissed and that said

defendant recover its costs and disbursements herein.

COSGROVE & TERHUNE,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

Howard G. Cosgrove, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant above named, and as such makes this verification on its behalf; that he has read the foregoing answer, understands and believes the same to be true; that he makes this verification for the reason that said defendant is a corporation of the State of Illinois, and at this time has no officer in the State of Washington capable of making this verification.

HOWARD G. COSGROVE.

Subscribed and sworn to before me this 4th day of November, 1927.

ROBERT S. TERHUNE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within answer received this 7th day of Nov., 1927.

BRONSON, JONES & BRONSON,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 8, 1927. [7]

[Title of Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto, by their undersigned attorneys, that this action, having been set for trial for Tuesday, September 4, 1928, at the hour of 10:00 o'clock A. M., may be tried and determined by the Honorable Jeremiah Neterer, Judge of the above-entitled court, without the intervention of a jury, such trial by jury being hereby expressly waived.

Done at Seattle, Washington, this 11th day of July, 1928.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.
COSGROVE & TERHUNE,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 14, 1928. [8]

In the District Court of the United States, for
the Western District of Washington, Northern
Division.

No. 11,940.

LAKE UNION DRY DOCK & MACHINE
WORKS, a Corporation,

Plaintiff,

vs.

FAIRBANKS, MORSE & CO., a Corporation,
Defendant.

JUDGMENT.

This cause, having come on regularly for trial upon Tuesday, the 4th day of September, 1928, before the undersigned sitting without a jury, the parties hereto having expressly waived trial by jury, and the Court having heard and considered all of the evidence herein, together with arguments of counsel, and being fully advised in the premises,—

NOW, THEREFORE, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED, that plaintiff do have and recover of and from the defendant the sum of Eight Thousand Two Hundred Sixty-six and 66/100 Dollars (\$8,266.66), together with six per cent interest thereon from Sept. 20, 1927, to the date of entry hereof, amounting to \$493.22, and together with its costs and disbursements herein taxed against the defendant in the sum of \$65.35, making a total judgment in favor of plaintiff, Lake Union Dry Dock & Machine Works, a corporation, and against the defendant, Fairbanks-Morse & Co., a corporation, in the sum of ———.

Defendant excepts and same is noted.

Done in open court this 18th day of September, 1928.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Sep. 18, 1928. [9]

[Title of Court and Cause.]

HEARING ON DEFENDANT'S MOTION FOR
NEW TRIAL.

Now on this 15th day of October, 1928, this matter comes on for hearing on the defendant's motion for a new trial with Bronson, Robinson and Jones appearing as counsel for the plaintiff and Cosgrove & Terhune appearing as counsel for the defendant. Said motion is argued by counsel and is denied. An exception is noted. Bill of exceptions is certified.

Journal No. 16, at page 355. [10]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that in the trial of this cause, beginning on the 4th day of September, 1928, the Hon. Jeremiah Neterer presiding, both parties appearing by counsel and having heretofore made and filed herein their written waiver of a jury, the following testimony was taken and proceedings had:

TESTIMONY OF H. B. JONES, FOR PLAINTIFF.

H. B. JONES, a witness for plaintiff, being sworn testified:

"I was attorney and secretary for the plaintiff in the latter part of 1926, and had business for the

(Testimony of H. B. Jones.)

plaintiff with the defendant. I had a claim to collect of eight thousand dollars balance due for repair work performed by plaintiff on the 'Ethel M. Sterling,' formerly the 'Hawaii.' I have a letter dated April 8, 1927, signed by Mr. Kuppler, who was the credit man for defendant here, written on the letterhead of the Sterling Steamship Company. Kuppler was treasurer of the latter company. I also had dealings with Mr. Miller, manager of the defendant's Seattle branch."

Whereupon the letter referred to was offered in evidence by plaintiff, and defendant objected as follows:

"I object to it as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has [11] never been brought to the knowledge of Fairbanks, Morse & Company."

Whereupon the Court ruled:

"Let it be admitted. Let it be filed. Proceed."

It was admitted in evidence and marked Plaintiff's Exhibit 1. To this ruling the defendant noted an exception, which the Court allowed.

The witness further testified:

"After the receipt of this letter, Mr. McLean, who is the President of the plaintiff corporation, and myself, went down to the defendant's office and called on Mr. Kuppler, its credit manager, and the gentleman I referred to as having signed that letter. We told him that we had come to see if we could not make some arrangement about

(Testimony of H. B. Jones.)

the payment of this bill or taking care of it. The contract under which the work was done provided that the payment should be made by March 1st. I have the contract in hand under which the work was done. It was between the plaintiff, by Otis Cutting and Sterling Steamship Company by Roy M. Sterling, President, and W. R. Kuppler, Treasurer."

The document was marked Plaintiff's Exhibit 2, offered and admitted in evidence.

The witness thereupon further testified:

"That contract provided that the payments should be made by March 1st, 1927. That payment had not been made, and this letter, Plaintiff's Exhibit 1, asked to postpone those payments over a period running up into the fall. Mr. McLean and I told Mr. Kuppler that the plaintiff was unwilling to let those payments be postponed as requested, that the plaintiff had an obligation of ten thousand dollars to meet on June 20th, and that it was very essential that it have these funds in hand on or before that time, and Mr. Kuppler stated that our claim was superior to their claim."

To which statement defendant objected as hearsay testimony. The Court sustained the objection, saying:

"Yes. Objection sustained to what he said unless it is shown it was in the presence of the defendant." [12]

The witness further testified:

"Defendant had a mortgage on the 'Ethel M.

(Testimony of H. B. Jones.)

Sterling' filed for record on December 11th for \$30,800.00—the defendant had furnished the engines for the vessel and Mr. Kuppler told us that in addition to the mortgage indebtedness they also had a claim of about twenty thousand dollars unsecured."

Defendant objected, on the ground that there was no showing that Mr. Kuppler had any authority of any kind whatever to make any statements.

"Kuppler said we need not have any fear because our claim was first and would ultimately have to be paid; that the ship was then on the way to Galveston, and was going to the Hawaiian Islands; that defendant had an interest in the freight moneys. I pointed out to Mr. Kuppler that we had not been furnished with insurance on this ship as provided in the contract, and that we wanted some insurance that the vessel would be security for our claim. He said he would take up the matter of insurance and see what could be done; that the defendant company carried blanket policies; that he did not know whether it could be handled under that, but he would see what he could do. We then left there without anything more definite being accomplished—I then received a copy of a letter from Mr. Kuppler to the plaintiff dated May 19th, with copy of covering note from Johnson & Higgins of Washington."

Duplicates of the same were marked Plaintiff's Exhibit 3 and admitted, notwithstanding the de-

(Testimony of H. B. Jones.)

defendant making the same objections heretofore made. Defendant excepted to the ruling.

The witness further testified:

“I examined the covering note attached to the statement and did not think it was proper insurance protection, and thereupon wrote to the defendant company, attention Mr. Kuppler.”

The witness thereupon produced a document, which was offered in evidence as a copy of said letter. The defendant objected, saying to the Court.

“May we, without bothering the Court, counsel and witness, have these objections run to all of these documents?” [13]

To which the Court replied:

“Same objection may run to all. Proceed.”

The document was thereupon marked Plaintiff's Exhibit 4.

The witness further testified:

“In that letter I notified the defendant that unless some action was taken to take care of our claim we would proceed to libel the vessel. I caused an inquiry to be made and ascertained that the ship was due to leave Galveston on the 4th of June. McLean and I then called on Kuppler about the last of May. I then told Kuppler we had firmly made up our minds we would not let the ship leave Galveston without libeling her for our bill. He said, ‘Well, don't do that. We will have to take care of it in some way. We can't afford to have that ship libeled.’ After some discussion he took

(Testimony of H. B. Jones.)

us over to Mr. Miller. Kuppler's office was on one side of the building and Miller's on the other. Miller was the manager of the defendant company here at Seattle. And Mr. Kuppler explained the situation to him. I told Miller we would not let the ship leave Galveston without libeling her for our bill. He was indignant, and said he thought we ought not to come there at that late date and put the matter up to him that way, that was wholly a surprise to him. I called his attention to our letter of the 20th of May, that has been identified, and told him that we had had the matter up with Mr. Kuppler and that I had written them telling them at that time what we were going to do if the bill was not taken care of. 'Well,' he said, 'I guess we have got to take care of it; we have got to take care of that in some way.' And he said, 'What are you going to insist on?' I told him that we were going to insist on the payment of the bill or guarantee of the bill. He then said he would like to have a day or two to refer the matter to his people, and I told him that we would give him time, I think it was about two days. It is my recollection that I asked Mr. Miller at that time if it was necessary for him to do that and he said that it was not absolutely necessary, but he would like to do it. Then on the 2nd of June Mr. Kuppler called me up and said that they would go ahead—or that they would guarantee our claim. He said, 'We don't want to pay it by the 20th of June and we don't want to pay interest on it.'

(Testimony of H. B. Jones.)

I told him that matter rested with Mr. McLean, who was then in Portland. I gave Kuppler his telephone number or his address."

"McLean is the principal stockholder of the plaintiff corporation and the president of the company. He wired me about the 2d of June. [14] McLean said that anything that was satisfactory as a guaranty to the bank to enable them to raise money would be accepted; that I could act on anything that was acceptable to the bank, if I could put it in form acceptable to them. I went over to the First National Bank and told Mr. Philbrick what we were proposing to do. We determined to put it in the form of a trade acceptance, so I called Kuppler back and told him that Philbrick had suggested that the simpler way to handle it would be to put it in the form of a trade acceptance. Kuppler said for me to take it up with Mr. Josiah Thomas, who was then attorney for the defendant company, and if he were agreeable to it, it would be all right. I took it up with Mr. Thomas and explained what we proposed to do. Thomas subsequently said it was all right, to go ahead that way. So I prepared a trade acceptance, accompanied by an assignment of our claim, with detailed bills and a letter addressed to the bank, and stated to Mr. Kuppler that we would put the assignment of our claim in escrow with the bank with a letter authorizing them to turn the assignment over to the defendant company when the trade acceptance was paid."

(Testimony of H. B. Jones.)

The trade acceptance was then marked Plaintiff's Exhibit 5. The letter to the bank was marked Plaintiff's Exhibit 6 and the assignment Plaintiff's Exhibit 7. Plaintiff thereupon offered in evidence Exhibits 5, 6 and 7, the following colloquy being had:

"The COURT.—The same ruling. Objection noted the same as before.

"Mr. COSGROVE.—Yes, continue these same objections the same as before and exceptions to the Court's rulings.

"The COURT.—Yes."

"Mr. COSGROVE.—If the Court please, the objections and exceptions will run not only to the documents, but to the testimony of the witnesses?

"The COURT.—Yes."

The witness further testified:

"I took the trade acceptance, the assignment and this letter, Plaintiff's Exhibit 6, and called on Mr. Kuppler, at the defendant's Seattle office, and showed him the trade acceptance, the assignment that I had prepared, also letter to the bank. Mr. Kuppler figured the interest at \$226.66 and added it in red ink on [15] the trade acceptance; also his own initials. Kuppler said they might want to pay this up sooner than the maturity date. Therefore, I inserted in the letter Exhibit 6 the words 'or sooner.' Kuppler took me over to Miller's office, explaining the situation to the latter, the way the amount was arrived at, the method I proposed to handle it by, putting the assignment

(Testimony of H. B. Jones.)

in escrow with the bank. The suggestion was made either by Kuppler or Miller that I should turn the assignment over to them absolutely inasmuch as they were giving us their trade acceptance. After some discussion I did so; I did not use the letter to the bank. The trade acceptance was then signed by Miller, who signed as Fairbanks, Morse & Company by C. R. Miller, agent. It was delivered to me and discounted by the plaintiff at the First National Bank. Later I was requested to release the interest of the plaintiff in the insurance policy under the rider that I have identified here, and as secretary of plaintiff company I signed a release of its interest in the insurance. The trade acceptance was not paid, although at maturity presented, dishonored and protested and has never been paid.”

On cross-examination the witness testified:

“Our first conversation with Mr. Kuppler was about the middle of May.

“Q. I think you said that Mr. Kuppler in some of his conversations with you in April or May led you to believe that Fairbanks, Morse & Company might possibly take care of this claim of yours.

“A. Not in April. He did in May very distinctly. Our first conversation was about the middle of May.

“Q. Did Mr. Miller make any such statement?

“A. Mr. Miller did at the meeting that we had

(Testimony of H. B. Jones.)

with him, which was the last of May. We did not see Mr. Miller at the first meeting, the middle of May.

“We did not see Mr. Miller until the last of May. He said, ‘Well, I guess— What can we do about it? I guess we have got to take care of this claim, haven’t we?’ and Mr. Kuppler said, ‘Yes.’

“Q. Do you remember him asking you if you had not come down to get your pound of flesh?

“A. Well, he put it rather that way, that we were trying to squeeze them in this thing. He took the attitude that we were coming down there that morning without any previous notice and saying, ‘Now, if you don’t pay us right now, we are going to libel this ship,’ and Mr. Miller was sore about it when we started to talk to him and then I pointed out to him that I had written that [16] letter of May 20th, which was at least a week before, and also that I had a talk with Mr. Kuppler and told him then what we were going to do.

“I do not remember showing the letter to him, but I know we talked about it. I told him I talked to Mr. Kuppler. I know I had that copy with me, and we did have it—I recall very distinctly that that was my answer to Mr. Miller’s attitude, that we had written this letter a week or more before telling them exactly at that time what we were going to do, and there was no question at that time that the letter had been received.

“Q. Did you tell Mr. Miller in this conversation in the latter part of May if Fairbanks, Morse &

(Testimony of H. B. Jones.)

Company did not satisfy you in connection with your claim that you would libel the vessel?

“A. Yes, sir. I would not say we limited it to Fairbanks, Morse & Company. We said if our claim was not paid immediately we would libel the [17] vessel, and it was understood they were the only ones that were in a position to take care of it.”

The witness further testified:

“In the fall of 1926, defendant company put Diesel engines in the ‘Ethel M. Sterling’ at the plant of the plaintiff. At the same time the plaintiff did certain other independent repair work. The vessel sailed from the dock about the 1st of January, 1927. At that time all of the work on the vessel, to which I have made reference, had been completed, nothing thereafter being done upon her and entering into this matter whatsoever. Our interest in relation to the vessel was the unpaid repair bill which was an obligation of the Sterling Steamship Company. We made no effort to libel the vessel for this unpaid bill before she left Seattle. Under the contract the steamship company had until March 1st to make this final payment. After the vessel left Galveston, she went to the Hawaiian Islands and was there libeled by the defendant company and bought in by it in the proceedings.

“Q. If Fairbanks, Morse & Company had obligated itself to pay the Lake Union Dry Dock & Machine Works this unpaid balance why was it necessary for you to tell Fairbanks, Morse & Com-

(Testimony of H. B. Jones.)

pany that if the matter was not taken care of you would libel the vessel?

“A. They did not tell us that until after I had made that statement anyhow.”

The Court saying:

“I don't care anything about that. You can argue that to the Court.”

The witness further testified:

“I knew Mr. Miller was the local manager of defendant company. At the time the trade acceptance was signed by Mr. Miller he did not tell me that he had no authority to sign, or that it was not worth the paper it was written on, and I did not tell him at the time that I would take a chance on it anyway. On the 2nd of June, Kuppler and I called upon Mr. Miller. Our previous conversation with Mr. Miller had been the latter part of May, at which McLean, Kuppler and I called on him.

“The plaintiff corporation, prior to June 2nd, 1927, had never had any experience in the matter of the sale of any claim to the defendant company, nor had it obtained any trade acceptance from anyone purporting to represent the defendant, and had no information which would [18] lead me to believe that Mr. Miller had ever previously accepted any trade acceptance. I knew in a general way that the defendant company was engaged in the manufacture and sale of machinery, particularly engines. I understood from Mr. Kuppler and Mr. Miller that they were keeping track of the vessel. They told me that she was to be in Galveston and

(Testimony of H. B. Jones.)

where she was going, and I understood they were collecting her freights and looking after her charters. Kuppler told me that originally, and then in the conversation with Miller that fact was developed, he speaking about the disadvantage to them through losing her charters, and it is possible he spoke of a damage suit. I understood they had an assignment of freights and whether they actually had a charter of the boat I won't be sure, but they certainly were supervising her every movement; they knew where she was going to be and where she was going to go and were interested in the operation of that boat—I suppose they were interested for the protection of their claim. They had about fifty thousand dollars in this boat and were interested in getting that money out. I did not know on June 2, 1927, and do not now recall any other pending business relations between the plaintiff and the defendant. If Mr. Miller had told me that the trade acceptance was no good I would have libeled that boat immediately, because it was then June 2d and I had time to libel the boat and that is what I proposed to do."

TESTIMONY OF WALTER R. KUPPLER,
FOR PLAINTIFF.

WALTER R. KUPPLER, a witness for plaintiff, being sworn, testified:

"For about fifteen years prior to January 1, 1927, I was credit manager of the defendant at

(Testimony of Walter R. Kuppler.)

Seattle. I was a trustee and treasurer of the Sterling Steamship Corporation and helped organize the corporation and held the office of treasurer so that I could watch the funds, but that had no relation to the defendant company. Mr. Miller was the local manager of the Seattle branch, the branch extending over Washington, Oregon, Idaho, part of Montana and all of Alaska. The defendant company has a manager at San Francisco, Los Angeles and sub-managers at Portland and Spokane. The Pacific Coast manager of the defendant, Mr. A. W. Thompson, at that time had offices at Los Angeles covering the entire Pacific Coast as far east as Salt Lake."

"Q. So that Mr. Miller here reported to Mr. Thompson? [19]

"A. Yes, sir.

"In 1926 I had several conferences with Mr. Jones, the witness just testifying. The first conversation in reference to the claim of the plaintiff against the 'Ethel M. Sterling' was had at the offices of the defendant here. At that time Mr. Jones and Mr. Cutting or Mr. McLean called and wanted to know when they were going to receive the balance due on the work performed. They had been promised payments and the Sterling Steamship Company was not able to make them, and the balance due was the amount covered by the trade acceptance. Mr. Jones said that if the plaintiff's claim was not taken care of he was going to libel the ship at Galveston. I was rather surprised at

(Testimony of Walter R. Kuppler.)

the time, and immediately took it up with Mr. Miller, and the consequence was that Mr. Miller telegraphed to the Pacific Coast manager and got an answer back and when we got that answer we acted. I heard Mr. Jones' statement that the Fairbanks, Morse people recognized the validity and priority of the plaintiff's claim, and the statement was correct. I was elected by the Board of Trustees as treasurer of the Sterling Steamship Company to look after the funds of that corporation.

"The COURT.—Did Fairbanks, Morse & Company know that you were elected to that position?"

"The WITNESS.—I don't know whether they did or not. I believe they did. The local manager would at least know.

"The COURT.—Did the furnishing of the engines for the ship by Fairbanks, Morse & Company have anything to do with your being elected to that position by reason of your being credit manager?"

"The WITNESS.—I believe not."

Whereupon the witness identified the document marked Plaintiff's Exhibit 8 as the telegram referred to as having been received from Mr. Thompson. Upon its admission, defendant's counsel repeated to the Court that the defendant still took the position that neither Mr. Thompson nor Mr. Miller nor anyone else had any authority to issue trade acceptances or guarantees.

The witness then identified a letter from Miller to Thompson dated May 21st, which was marked as Plaintiff's Exhibit 9 for identification.

(Testimony of Walter R. Kuppler.)

The witness then testified:

“Mr. Miller handed me the telegram which I took to our attorneys, Messrs. Van Dyke & Thomas, in [20] Seattle. I wanted them to find out and advise me which was the best way of handling the account of the plaintiff.

“Q. I know. The choice between what two ways or three ways or—

“A. Well, the telegram had suggested a way of handling it and—or perhaps I am getting a little ahead of the story. I called up Mr. Jones and told him of the advice we had received and that we wanted additional time. He said McLean was in Portland and gave me his number, I called him up and told him we had received advice to guarantee the payment of the account, and wanted time. Later in the day I talked to Mr. Thomas of Van Dyke & Thomas, and he stated to me on the telephone that that was the simplest way to handle it by trade acceptance.

“Q. Did you acquaint him with all the facts in the matter?

“A. Well, he had saw the original telegram.”

“I signed the trade acceptance on the margin in red ink. The signature to Exhibit “9” is Mr. Miller’s signature.”

It was then offered in evidence, the defendant making the same objection as to previous exhibits.

The witness further testified:

“The assignment of plaintiff’s claim against the ‘Ethel M. Sterling’ was delivered at the time the

(Testimony of Walter R. Kuppler.)

trade acceptance was signed. I do not recall about the release of insurance made at that time.”

On cross-examination the witness testified:

“I heard what Mr. Jones testified about my conversation with him in May. I told him that the plaintiff had preference, a lien there prior to our mortgage, and that it would have to be taken care of in due course. I did not tell him that the defendant would take care of that bill. I did not tell him we would pay them any cash, but I told McLean over the long distance phone that we would guarantee the account. I did not tell them that the defendant would pay the bill. I did not tell Mr. Miller that I had said to the plaintiff that the defendant would guarantee the account.

“I recollect the conversation the latter part of May between McLean, Jones, Miller and myself. At that time McLean and Jones called at my office and told us they were going to libel the ship at Galveston unless they received payment for the unpaid balance on plaintiff’s claim, and I took them over to Mr. Miller’s office and they repeated the same statement. Mr. Miller objected. [21] Neither Miller nor I at that time said to either of these gentlemen that the defendant would pay their claim. At that time neither one of us said to them that defendant would buy the claim. Mr. Miller made a remark like ‘I guess you are demanding your pound of flesh right now,’ and Mr. Jones replied, ‘It amounts to about that, only we are willing to give you a few more days’ time.’ Miller

(Testimony of Walter R. Kuppler.)

said, 'I would like to take it up with our people,' meaning the other executives of the defendant company.

"In the latter part of May, all the original engine construction work had long since been over, and the work for which the plaintiff claimed \$8000.00 for repair work had long since been done. There was not then pending any going business relations between the defendant and the plaintiff. On the 2d of June, when Mr. Jones was at the office of Mr. Miller, I was there. Jones had had the trade acceptance prepared and brought it over to my office, and we made some alterations in it and I O. K.'d it in the margin and we took it over to Mr. Miller and we told Miller all the details about it; that I had consulted with our attorneys and they had suggested it was the simplest way to handle it. This was the first time we had taken an assignment of an account as large as this. We had taken similar assignments of smaller accounts sometimes to protect mortgages on other little boats that amounted to perhaps a few hundred dollars or less. They were not many; over a period of years perhaps a few. I can recall one—an account up in Everett during the time while Miller was manager. I do not recall any other such occasions. I do not recall any occasion when the defendant bought any claim for any other reason. I never knew of the defendant accepting any trade acceptances. This was the first time a trade acceptance was negotiated here to my knowledge. I do not recall any notes being

(Testimony of Walter R. Kuppler.)

made by any manager or other representative of the company in Seattle. I do not recall as to notes but I do as to warrants, small warrants, school districts and water districts throughout the state; the arrangement at the First National Bank here at Seattle was that they would accept Mr. Miller's endorsement as agent on amounts not to exceed five hundred dollars and there were several of those.

“Q. Several; what do you mean by several?”

“A. Well, many of them every month, many warrants in small denominations that we would deposit the same as checks and the bank would carry that paper.

“Q. Larger amounts than five hundred dollars?”

“A. Not to my knowledge. My recollection is that that was the limit. Anything in excess of [22] that amount was sent to Chicago.

“Q. Who put the limit on them; Chicago?”

A. No; the bank itself. They did that as a matter of convenience to us.

“On the 2d of June the trade acceptance was delivered to Mr. Jones and the assignment of accounts taken. Jones said he would put the letter in escrow until the trade acceptance was paid. Mr. Miller said it would be just as well to retain that in our vault here in Seattle.” [23]

“I do not recall Miller making any protest against executing the trade acceptance. I do not recall him telling Mr. Jones prior to his delivery of the trade acceptance that he had no authority to sign it.

(Testimony of Walter R. Kuppler.)

“Q. Is it possible that it may have been said and slipped your memory?

“A. That might be possibly true, yes, sir.

“Q. What was the limitation, if you know, of the local manager in the execution of sales contracts?

“A. Why, he would approve contracts up to five thousand dollars—and copies of those contracts would go to the home office as well as to the Pacific Coast Manager’s office at Los Angeles at that time. Beyond that between five and ten, they must have the approval of the Pacific Coast Manager, at Pacific Coast Manager’s headquarters, and in excess of ten thousand they had to go to Chicago as well as to the Pacific Coast Manager, but the contracts regardless of the amounts are always approved by the local manager after they O. K.’d or initialed by the other higher executives if they succeed, regardless of the amount.”

TESTIMONY OF J. L. McLEAN, FOR
PLAINTIFF.

J. L. McLEAN, a witness for plaintiff, being sworn, testified:

“I am the president and one of the stockholders of the plaintiff company. I remember the transactions which have been testified to with reference to the ‘Ethel M. Sterling’ and the account that plaintiff had against the Sterling Steamship Company and negotiations between ourselves and Mr. Jones in our behalf and the defendant corporation.

(Testimony of J. L. McLean.)

I went down on two occasions in the early part of May with Mr. Cutting and interviewed Mr. Kuppler and told him that the balance due on this job had been delinquent since the 1st of March and we needed the money very badly, and wanted to get some specific definite knowledge just where that money was coming from, for the reason that Mr. Kuppler had represented to our company and to Mr. Cutting that we need have no fear, that the defendant was furnishing some thirty or forty or fifty thousand dollars' worth of engines for this boat. Mr. Kuppler was an officer of the Sterling Steamship Company and supervising charter parties, and I recall this conversation on two occasions that when these moneys were paid over and came into his possession he would see to it that we were properly taken [24] care of. I should say he was speaking of himself in a dual capacity for the defendant as well as the Sterling Steamship Company. We were not satisfied at the delay attached to these payments and insisted that defendant, being a large national outfit and having such a large claim against the vessel, could well afford to take care of our little claim and be in full control of the boat, as well as supervising its charter parties and operations through the Sterling Steamship Company, of which their credit manager was also an officer. We did not get very far with Mr. Kuppler other than to have his assurance and good offices. Then I took it up with our attorney and secretary, Mr. Jones, and told him we would have

(Testimony of J. L. McLean.)

to press the matter. This resulted in Mr. Jones, Mr. Cutting and myself calling on Mr. Kuppler the latter part of May. Jones had the information at that time as to when the vessel would arrive at Galveston. We told Kuppler we intended to protect ourselves when that ship got to Galveston, but that we wanted to be decent with the defendant and give them an opportunity to come in and pay us up and take an assignment of our claim because we had to make a large payment of June 20th. Kuppler took us over to see Mr. Miller, the local manager. Jones stated our case as I have recited it, upon which Mr. Miller remarked to Mr. Kuppler, 'Well, Mr. Kuppler, if we don't do something with this matter what will happen to us?', to which Kuppler replied, 'Well, these gentlemen will libel the vessel.' Following that Miller wanted to know how much time he could have as he wanted to take the matter up with his people, and Jones said he would give him two days longer. In the meantime I went to Portland. On June 2d Kuppler called me on the phone and said, 'Fairbanks, Morse are going to guarantee your claim, but we want more time and we don't want to pay any interest.' I told him that we didn't object so much to time if the guaranty was acceptable to the First National Bank and our attorney; that Mr. Cutting might have to borrow money to make the payment referred to on the 20th. I then wired Jones. That about concludes my negotiations in reference to this claim until it was repudiated by the defendant. When

(Testimony of J. L. McLean.)

Jones and I had the conversation with Mr. Kuppler, with Mr. Miller present, Mr. Jones referred to his letter of May 20th. I do not remember whether Jones had a copy of the letter with him at the time or not.”

On cross-examination the witness testified:

“Q. Now you said something about Mr. Miller telling you on about May 31st that he wanted to take this up with his people? Did he say who his people were?

“A. Why, he didn’t have to. I thoroughly understood that as being his superiors.

“Q. What superiors; did he tell you who they were?

“A. No, I didn’t care. I thoroughly understood that was his superiors when he said his people.
[25]

“Q. I was trying to find out from you if you knew what superiors, what their names were.

“A. No. I didn’t question that at all.

“Q. Did he tell you whether they were in San Francisco or Chicago?

“A. No, I didn’t inquire or he didn’t state.

“The method of receiving our money was entirely too slow, and I wanted either Mr. Kuppler to speed up the collection of the moneys or have the defendant formally take over the whole matter. It was my judgment that he was representing the defendant and the Sterling Steamship Corporation. The defendant had a large sum of money in the vessel and Kuppler was the credit

(Testimony of J. L. McLean.)

manager of the defendant and an officer of the Sterling Steamship Corporation 'all of which undoubtedly must have been known to Fairbanks, Morse.'

"Q. Of course you are making your guess. During all this time the Sterling Steamship Corporation owed you this money, didn't it?

"A. We so carried the account on our books, to be sure, Sterling Steamship Company, because that is the way the contract was signed.

"During the time of my conversation with Mr. Kuppler down to June 2d I knew that Mr. C. R. Miller was the local manager of the defendant, although I never met him until the meeting in the latter part of May. In the past ten or fifteen years I have represented many different corporations as liquidator. During that time I have known of the defendant company, and generally knew the kind of business it carried on, that is, the manufacture of gas engines, pumps and scales."

TESTIMONY OF OTIS CUTTING, FOR PLAINTIFF.

OTIS CUTTING, a witness for plaintiff, being sworn, testified:

"I am the vice-president and general manager of plaintiff, and was in touch with Mr. Kuppler from the beginning of the work or before the work started. In the month of May, 1927, we had been assured by Mr. Kuppler that the account would be taken care of—of course in a general way—

(Testimony of Otis Cutting.)

there was no definite statement made as to who was going to take care of it—long before that time. At the time when Mr. Jones, Mr. McLean and Mr. Kuppler called on Mr. Miller the latter part of May, Mr. Jones had his copy letter of May 20th with him I remember it very distinctly.” [26]

On cross-examination the witness testified:

“At the conversation just referred to Mr. Miller was quite provoked at this matter coming up so soon, and Exhibit 42 was referred to at the time as having taken place previously. Miller picked it up and glanced at it and laid it down. It was not read to him. Mr. Jones had it in his hand and took it away with him.”

TESTIMONY OF WILLIAM J. SMITH, FOR PLAINTIFF.

WILLIAM J. SMITH, a witness for plaintiff, being sworn, testified:

“I am superintendent for the City of Seattle of the Western Union Telegraph Company, served with a subpoena to bring up certain telegrams, and I object to the introduction of these telegrams unless ordered by the Court to present them.”

The Court thereupon directed to witness to proceed. These papers were marked Plaintiff's Exhibits 10, 11, and 12, to which defendant made the same objections as to previously admitted exhibits, the Court saying:

“Yes. Admitted.”

TESTIMONY OF HARRY R. SANDERSON,
FOR PLAINTIFF.

HARRY R. SANDERSON, a witness for plaintiff, being sworn, testified:

“I am manager in Seattle of the Federal Telegraph Company, served with a subpoena to produce certain telegrams. I have one here which is a private one and I would like to have the Court rule an order for it.”

To which the Court ordered:

“Produce it.”

It was marked Plaintiff's Exhibit 13 and offered in evidence.

Whereupon the plaintiff rested. [27]

TESTIMONY OF A. W. BOUGHEY, FOR DEFENDANT.

A. W. BOUGHEY, a witness for defendant, being sworn, testified:

“I live in Chicago, Illinois. I have been secretary of the defendant company for twenty-five years, and at intervals secretary and treasurer and secretary and comptroller. As such official I have had charge of all the general financial and accounting operations of the company which began business in 1858 in Chicago. The character of its business is the manufacture of Diesel engines, scales, steam pumps, electrical equipments and the sale of those products. They are distributed throughout the country through local sales offices, 26 or

(Testimony of A. W. Boughey.)

somewhere thereabouts and five or six abroad. As secretary of the defendant company I am familiar with its charter and by-laws which have been and are in my custody. I now have the minute books of the corporation with me. I have prepared a copy of the by-laws of such corporation in effect on June 2, 1927."

Upon stipulation of counsel, the copy was treated as the original. It was marked Defendant's Exhibit "A-1" for identification.

"I know the authority of the Seattle manager during the year preceding June 2, 1927. My knowledge was predicated upon my association as director and secretary of the defendant for nearly twenty-five years. There is no written record of the authority. The business for the defendant at Seattle was done through the local sales manager, C. R. Miller, who was in charge of the local sales office. He sold the goods for us and looked after the installation of the goods, looked after the servicing of the goods and collected the proceeds and paid the proceeds into a treasurer's account in a local bank here that we in Chicago drew against and he could not draw against; that ended the transaction. When he wanted any money he wrote a letter to Chicago every week specifying how much money he might require for the next week, and we opened a local account in his name under which he paid those remittances and against which he drew checks for expenses for freight, that is including his salesmen's wages and his office help;

(Testimony of A. W. Boughey.)

all that money was obtained from Chicago upon his written requisition.”

The Court inquired:

“When goods were sold and not paid for in cash, who arranged for the security or payment?
[28]

To which the witness replied:

“If the local manager did not collect in cash he got a note and those notes would be sent to Chicago for endorsement or for discount by them. He had absolutely no right to discount notes here or sign endorsements, and never did.

“Not to my knowledge did the company purchase any claims against other people through the local office.”

The witness was handed a letter from Fairbanks, Morse & Company by W. R. Kuppler, dated June 10, 1927, which arrived in Chicago June 14, 1927.

“This letter was considered by the president, general credit manager, vice-president and treasurer and myself. Mr. Kiddoo was the vice-president and treasurer of defendant and the general credit manager’s name was F. C. Dierks, who held these positions in June and July of 1927. Upon receipt of the letter just mentioned Mr. Dierks and Mr. Kiddoo made a visit to Seattle to investigate the whole matter and discussed what was the best thing to settle the whole matter; that is what they came for, to settle the whole matter after they had ascertained all the facts. At the time said letter of June 10th came in, the home office had not had

(Testimony of A. W. Boughey.)

any knowledge of any trade acceptance such as the one pleaded in the complaint.

“Q. Did the Seattle office, the Seattle manager, at any time during your experience with the company prior to June 2, 1927, accept any trade acceptance?”

“A. No.

“Q. What, if any, was his authority in the matter of purchase of claims, if any?”

“A. He would have no authority to purchase claims on his own responsibility.”

At this time the letter of June 10th, referred to by the witness, was marked Defendant's Exhibit

“A-2” and admitted. Defendant then offered in evidence Defendant's Exhibit “A-1” for identification. It was admitted, the plaintiff first objecting upon the ground that it was incompetent, irrelevant—and then stating:

“There is no objection on the ground that it is not the original.” [29]

The witness further testified:

“The letter of June 10th is the first information I had in connection with the trade acceptance mentioned in plaintiff's complaint; if it had been brought to the attention of any of the officers of the home office prior to June 10th, it would have come to my attention. The company's records, including minute books and by-laws are kept in Chicago. Exhibit ‘A-1’ is made from such records.”

TESTIMONY OF C. A. PHILBRICK, FOR DEFENDANT.

C. A. PHILBRICK, a witness for defendant, being sworn, testified:

“I am the vice-president of the First National Bank of Seattle, having been such for about five or six years. I know Mr. Harry Jones, J. L. McLean, C. R. Miller, the defendant and the plaintiff. Prior to June 2, 1927, the defendant was a depositor of said bank, maintaining two accounts—one kept by the branch house at Seattle in the name of Mr. C. R. Miller, Manager. The defendant carries its general account in which deposits go for its credit, and then there is another account which is carried in the name of C. R. Miller that is reimbursed by remittances from Chicago. The bank had written instructions from the home office or from the principal officials of the defendant relative to these accounts. I knew prior to June 2, 1927, that the home office of the defendant was in Chicago. The bank had from the defendant instructions relative to who might sign paper which was to be transferred through these accounts.”

The defendant identified Defendant's Exhibit “A-3,” offered it in evidence, to which plaintiff objected and the objection was sustained, to which ruling defendant took an exception.

The witness further testified:

“I had a conversation with Mr. Harry Jones during the month of May, 1927, relative to the

(Testimony of C. A. Philbrick.)

matter of procuring a guarantee from the defendant for the amount which was owed the plaintiff from the Sterling Steamship Corporation. Mr. Jones asked me what form of guarantee could be used, guaranteeing a certain sum to be guaranteed by the defendant, and I told him that I thought the best form would be in the nature of a trade acceptance. I told him that the acceptance should be accepted by the defendant [30] by an authorized officer of the company. I told him that the paper we had had in the past had always been endorsed by Fairbanks, Morse & Company by Mr. Miller, treasurer of the company at Chicago, which Mr. Miller is not Mr. C. R. Miller. At this conversation Jones had with him a telegram from Mr. McLean."

The witness identified a letter to the bank of date July 7, 1927, testifying:

"It was received by the bank about July 7, 1927."

It was marked Defendant's Exhibit "A-4," offered and admitted in evidence.

"The bank discounted the trade acceptance (Plaintiff's Exhibit 5) and gave the plaintiff credit for it shortly after it was issued."

TESTIMONY OF WALTER R. KUPPLER,
FOR PLAINTIFF (RECALLED—CROSS-
EXAMINATION).

WALTER R. KUPPLER, a witness for the plaintiff, by the consent of counsel and the Court, was recalled for further cross-examination, testifying:

“Prior to May 13, 1927, I had five thousand dollars stock in the Sterling Steamship Corporation. I did not have any stock at the time the letter of June 10th was written.

“Q. Did you inform Mr. Miller of your ownership of that five thousand dollars’ worth of stock?

“A. I believe not.”

On redirect examination, the witness testified:

“Q. Was your relationship with the Sterling Steamship Corporation in any measure or in part in order to enable you to protect or take care of the interest of Fairbanks, Morse & Company?

“A. I always considered it so, yes, sir.”

TESTIMONY OF C. R. MILLER, FOR DE-
FENDANT.

C. R. MILLER, a witness for defendant, being sworn, testified:

“I am and have been since August 24, 1919, local manager of the defendant at Seattle. I know Mr. Harry Jones, Mr. J. L. McLean, Mr. Philbrick, Mr. Kuppler and Mr. Boughey, [31] witnesses who preceded me. During this period the kind and

(Testimony of C. R. Miller.)

character of business of defendant as conducted at Seattle, Washington, was the selling of merchandise manufactured by the several factories of the defendant; that consists of engines, pumps, motors, scales, and some auxiliary equipment. The home office of the defendant is Chicago. The make-up of my own office as a part of defendant's organization we have a manager, department manager, salesmen in charge of the different departments; the engine and pump departments have a man in charge, and we have a credit manager. The salesmen covering the various parts of the territory work and report directly to the office, and the records are kept by the accounting department and the orders are handled and executed by the order department. I was the active controlling head of this branch during 1926 and 1927. My duties were to see that the goods were sold and installed, if sold that way, and the necessary service given them; also to see to it that the accounts were collected and the records kept.

“Q. To whom did you report, if to anyone,—to whom did you make reports of your business?”

“A. Well, I reported to Mr. Thompson, Mr. A. W. Thompson, the Pacific Coast Manager, at that time located at Los Angeles.

“We sent our statement of accounts to the home office. To pay our expenses it was necessary for me to obtain our money from the Chicago office, and that was done in the form of a requisition. They would send me a check and I would deposit

(Testimony of C. R. Miller.)

it in an account in the First National Bank. I did not have to go through Mr. Thompson for that. This account was in the bank carried under my name as agent. The moneys received from collections were deposited in the same bank in the name of the defendant, what we called a corporation account, over which I had no control whatever. It was a home office account. During my managership at Seattle we purchased no claims and never accepted any trade acceptances except the one in question. During this time the credit manager, as Mr. Kuppler, whose duty it was to pass upon the credit standing of the customers who made purchases from us; also to make the collections. In addition to that he did some accounting, kept the general ledgers of this office. I remember the installation of engines in the 'Ethel M. Sterling.'

“Q. There was something said here about a contract between Fairbanks, Morse & Company and the Sterling Steamship Corporation for the installation of those engines? Do you recollect such a contract? “A. Yes, sir.

“Q. Do you know who initiated that?

“A. That contract was made by Mr. Whitehead, A. S. Whitehead. [32]

“Q. Made by him; do you mean it was brought into the office by him?

“A. Well, I don't know who brought it in. I presume he brought it. He made the contract, signed the contract.

(Testimony of C. R. Miller.)

“Q. You do not mean he was the man who signed it?”

“A. Yes; I am quite sure that is right.

“Q. Now, coming over to the period between the 1st of January, say, 1927, and the 31st of May, 1927, you heard Mr. Kuppler’s testimony—or Mr. Jones’ testimony and Mr. McLean’s testimony to the effect that Mr. Kuppler had told them that Fairbanks, Morse & Company would have to take care of this unpaid balance of the Lake Union Company?”

“A. I heard the testimony. [33]

“Q. Was that statement made upon your authority?” “A. No, sir.”

“I did not know Mr. Kuppler had made any such assurances or conversations with these gentlemen. I didn’t know anything about Kuppler’s ownership in the stock of the Sterling Steamship Corporation. I recollect the conversation between Mr. Harry Jones and Mr. McLean and myself on the 31st of May, 1927, in my office. Mr. McLean, Mr. Cutting, Mr. Jones and Mr. Kuppler came in. Kuppler told me that the Sterling Steamship Company owed the Lake Union Dry Dock Company some eight thousand dollars and that these representatives of the Dry Dock Company were there to get the money—this was the first I knew of any indebtedness of that kind, and I was surprised they came down there to get the money and told them so. I told them that if they wanted to collect that money they would have to go to the Sterling Steamship Company.

(Testimony of C. R. Miller.)

Mr. Jones stated that they could not get any money from the Sterling Steamship Company; they came down there to get it from us or a guarantee. I explained that I could not give them a guarantee. I could not pay them the money nor could I give them a guarantee because it would take an action of the Board of Directors to authorize me to do anything like that. Mr. Jones stated that if we would not give them a payment or guarantee they would libel the vessel, which was then at Galveston I think loaded with cargo consigned to Honolulu. Mr. McLean explained why they were down there after the money. It was because they owed a certain amount and had to have it; that the defendant was a strong concern and could afford to pay it, while it was a small concern and could not. I told him that did not interest the defendant. This obligation was between the Sterling people and Lake Union Dry Dock, but Jones said the Sterling people already owed us a considerable sum, that we would have to pay it or he would libel the ship and force us to pay it. There had been an arrangement made to assign to the defendant the freight money covering this cargo, which Mr. Jones knew, and I asked him if the boat being loaded with sulphur and the freight money assigned to us, if that made us responsible in any way for the operation of the ship or any damages that might come up by reason of delay that would follow a libel proceeding, and he said that it would. Kuppler also advised me we would be liable. I didn't know myself, but I took

(Testimony of C. R. Miller.)

their word for it. It was my understanding that the defendant would be liable on account of this vessel being loaded.

“Q. What, if anything, was said at that time by anyone relative to the Lake Union unpaid balance against the Sterling Steamship Corporation being a prior lien against the vessel, that is prior to the preferred [34] mortgage of Fairbanks, Morse & Company?”

“A. I asked about that too, and I was told that it was a prior lien by Jones and Kuppler, and was also told the same over the phone by our then attorney, Mr. Thomas.

“After he told me about the damages, that we would be liable for damages, I told him that it would be necessary for me to take the matter up with our people, and he said, ‘You will have to do it promptly because I am going to have this settled right away.’ I said, ‘It will take all night to get a telegram through,’ and he said ‘I have got to be out of town to-morrow and I will give you two days to settle,’ and I said, ‘Well, it looks to me as though you gentlemen waited until this vessel has been loaded and then you come down here to demand your pound of flesh,’ and Mr. Jones said, ‘That is just about right, I thought you would be smart enough to understand that.’ I sent a telegram to Mr. Thompson and I received a reply inquiring if our mortgage was not prior to these claims in accordance with the Jones Act. I discussed it again with Mr. Kuppler and advised that

(Testimony of C. R. Miller.)

it was a prior claim, and I wired Mr. Thompson again that it was a prior claim. He wired back to me the next day, which telegram I gave to Kuppler, and I think Mr. Jones came back that day—he and Mr. Kuppler came to my office and laid down this trade acceptance, which is Plaintiff's Exhibit '5.' Kuppler said our attorney advised this trade acceptance was the right way to handle the situation. I then called up Mr. Thomas on the phone and asked him about it and he said he understood the situation and that it was the proper thing to do. After he so advised me, I signed it. As I signed the acceptance I told Mr. Jones I had no authority to sign paper like that and did not think it was any good. That was when I handed it to him. He said, 'Well, that is all right, I will take it anyway.' He said, 'Here is an assignment of the claim, which I will place in the bank, and then said, 'No; I have the acceptance and I might as well leave it here,' and laid it on the table and went out. That assignment is Plaintiff's Exhibit '7.' This is the only one I had and it was turned over to Mr. Cosgrove in July.

The witness was handed certain exhibits for examination, thereafter testifying:

"I never before saw Plaintiff's Exhibits 1, 2, 3 and 4."

"Q. Something was said yesterday by Mr. Kuppler I believe that Exhibit '4' was exhibited at the time of the conversation between yourself and Mr. Jones. Was it exhibited?"

(Testimony of C. R. Miller.)

“A. No. I never saw it before.

“I never before saw Plaintiff’s Exhibit 6. I did not know anything about any insurance [35] being placed by or through my office on account of any interest of the Lake Union Dry Dock & Machine Works in the vessel ‘Ethel M. Sterling.’ ”

On cross-examination the witness testified:

“Q. You had a mortgage on the vessel, didn’t you? “A. Yes.

“Q. And you were vitally interested in the vessel proceeding on her voyage and earning her freight, weren’t you?

“A. We were interested in getting our money.

“Q. And they had a lien on this ship and your attorneys had advised you it was prior to yours and they could go ahead and foreclose the lien and stop the ship right in Galveston, that was what interested you, wasn’t it?

“A. No, it was not.

“I do not remember taking any assignment of claims against the ‘Oliver H’ owned by James H. Hawthorne of Everett, to protect a mortgage.”

The plaintiff produced a copy of a letter, which was stipulated by the parties to have been received by the plaintiff in the due course of mail about its date. It was admitted in evidence as Defendant’s Exhibit 4.

TESTIMONY OF HERMA ANDERSON, FOR
DEFENDANT.

HERMA ANDERSON, a witness for the defendant, being duly sworn, testified:

“I am stenographer to Mr. C. R. Miller, having been such for the last six years and two months. My desk is just outside Mr. Miller’s office; there is just a glass partition that separates us, which does not reach to the ceiling. I have heard all of the testimony in this case. I recollect Mr. Jones and Mr. Kuppler calling on Mr. Miller on the 2d of June, 1927. Mr. Kuppler and Mr. Jones came in with the trade acceptance and asked Mr. Miller to sign it. He said ‘I have no authority to sign this document.’ Mr. Jones said, ‘Well, I will accept your signature,’ and Mr. Miller signed it, but as he did so he said, ‘I have no authority to sign this document and it is no good.’ Mr. Jones said he would accept his signature and that was the end of the conversation, and Mr. Jones left the office directly after.” [36]

On cross-examination the witness testified:

“Mr. Jones was in the office this last time a very short while. I am not sure that I have stated all of the conversation that took place, and I do not know whether I was at my desk all of the time he was there, but that is all the conversation I heard. I do not remember just when he came in.”

Whereupon the defendant rested.

TESTIMONY OF H. B. JONES, FOR PLAINTIFF (RECALLED IN REBUTTAL).

H. B. JONES, a witness for the plaintiff, was recalled in rebuttal, testifying:

“Q. Mr. Jones, you heard Mr. Miller’s testimony with reference to what he said to you about the validity of his signature and so forth and so on?”

“A. Yes.

“Q. What was said, if anything, in that respect?”

“The COURT.—Did he make that statement?”

“A. He did not make that statement. He asked Mr. Kuppler if it was all right to go ahead and sign this trade acceptance and Mr. Kuppler said it was. And with relation to the time when the assignment was delivered, that assignment was delivered before the trade acceptance was signed.

“Q. Was any objection made to delivery of it in consideration of the acceptance being signed?”

“A. Absolutely. Before the acceptance was signed my recollection is that Mr. Kuppler first made that suggestion to me, but it might have been made by Mr. Miller, that they wanted the assignment delivered to them absolutely, and there was considerable discussion about that and after that discussion I finally said, ‘All right, I will turn the assignment over to you absolutely instead of putting it in the bank.’”

“Q. How long was this conversation the last time?”

“A. The last time I went in there when the trade

(Testimony of H. B. Jones.)

acceptance was signed it was fully a half hour. I went into Mr. Kuppler's office first and we discussed it for I should think possibly ten minutes and then we went in Mr. Miller's office and we were in there fifteen or twenty minutes.

“Q. I think you testified, didn't you, that you did refer to this letter that you had written to them on the 20th?

“A. That was at the preceding conference that we had when I told them that I would give them two days to get some action on this thing and at that time Mr. Miller was taking me to task for coming down there and springing it on them suddenly, and I remember very distinctly telling Mr. Miller that I did not consider that it was sudden, that I had [37] written them on the 20th, and my best recollection is that I had the copy of the letter in my hand and either showed it to him or read him a portion of that letter. I recall very distinctly referring to that letter. It was addressed to Fairbanks, Morse & Company.”

TESTIMONY OF WALTER R. KUPPLER,
FOR PLAINTIFF (RECALLED IN RE-
BUTTAL).

WALTER R. KUPPLER, a witness for the plaintiff, being called in rebuttal, testified:

“There is a partition about ten feet high between Mr. Miller's office and Miss Anderson's desk; a glass partition, the upper half. Her desk was

(Testimony of Walter R. Kuppler.)

one or two feet away—possibly about eight to ten feet from Mr. Miller's desk.

“Q. Was it easy to hear over that partition?

“A. Well, it is rather noisy. It is right in the store. It is rather noisy there with customers in there all the time, but it is possible to hear over it very easily.” [38]

The exhibits hereinbefore mentioned are as follows:

Plaintiff's Exhibit 1 is a letter, on letter-head of the Sterling Steamship Corporation, dated April 6, 1927, to Lake Union Dry Dock & Machine Works, signed by Sterling Steamship Corporation, by W. R. Kuppler, treasurer, reading:

PLAINTIFF'S EXHIBIT No. 1.

“We enclose herewith the following checks on the American Exchange Bank in your favor aggregating \$4076.90.

“Check #166 \$393.56; check #167, \$1977.13; check #169 \$1706.21. This makes a total of \$19,876.90 paid to you during the past few months and I want to express to you our appreciation for the manner in which you have helped in taking care of this new organization.

“We want to particularly thank your Mr. Otis Cutting, Vice-president and General Manager, and your President, Mr. J. L. McLean.

“This then leaves a balance of \$8208.25. \$208.25 of this balance we understand represents invoice

against 'Bert E. Haney' and \$8000.00 balance upon the 'Ethel M. Sterling' formerly 'Hawaii.'

"While there was some question in Captain Sterling's opinion about the first bills against the 'Hawaii' amounting to something like \$4000.00 we are not going to question the correctness of same although they seemed high, for the reason that the courteous treatment received during the past several months and in connection with the remaining balance of \$8000.00 upon the 'Ethel M. Sterling' we want your co-operation and we believe that this balance will be liquidated in the following manner: \$4000.00 on or before August 10th, 1927; balance of \$4000.00 on or before December 10th, 1927.

"You understand that Fairbanks, Morse & Company are extending terms of payment on the 'Ethel M. Sterling' for a period of three years and the writer made a trip to Chicago in connection with this sale and that your contract work, plus extras ran beyond everyone's estimate and for that reason we believe that we can look forward to your co-operation in paying this account as recited above and in view of the fact that you have received more money, namely \$19,876.90 than any other company.

"Will you please send us a new set of bills in triplicate for the work done upon the 'Oregon Fir' all upon one bill for \$1706.21 billed against the 'Oregon Fir' and owners, marked paid, as it is necessary for us to take legal action to reimburse ourselves in connection with this work.

“Thanking you for your acknowledgment in due course, we are,” [39]

Plaintiff's Exhibit 2 is a contract between the Lake Union Dry Docks & Machine Works, by Otis Cutting, General Manager and Treasurer, and Sterling Steamship Corporation, by Ray M. Sterling, President, by W. R. Kuppler, Treasurer, dated October 14, 1926, wherein the Lake Union Company agrees to complete certain work on the steel schooner “Hawaii” upon certain terms reading:

PLAINTIFF'S EXHIBIT No. 2.

“There is now due and owing \$4022.06 for work already accomplished on the ‘Hawaii.’ This together with said \$11700.00 makes a total of \$15722.06, of which it is agreed that the owner will pay \$10,000.00 on or before November 25, 1926, and the balance on or before March 1, 1927. The cost of any additional work performed by contractor shall be paid upon completion of work and before vessel leaves Port.

“It is further agreed that the owners shall carry insurance on said vessel in a reliable company for an amount sufficient to protect our account and made payable in event of loss to the Lake Union Dry Dock & Machine Works.”

Plaintiff's Exhibit 3 purports to be a letter from Fairbanks, Morse & Co., by W. R. Kuppler, Credit Manager, to Lake Union Dry Dock & Machine Works, dated May 19, 1927, to which there is attached a copy of a purported letter from Johnson & Higgins of Washington, Inc., to Sterling Steam-

ship Corporation, dated May 18, 1927, re M/B "Ethel M. Sterling," the former letter reading:

PLAINTIFF'S EXHIBIT No. 3.

"In accordance with talk with your Mr. John L. McLean, President, and H. B. Jones, attorney under date of May 13th, at this office, we have placed \$20,000.00 additional insurance upon the motor vessel 'Ethel M. Sterling' as per copy of letter from Johnson & Higgins of May 18th enclosed herewith, wherein loss is payable to Fairbanks, Morse & Company and the Lake Union Dry Dock & Machine Works as their respective interests may appear.

"Above for your information. A copy of this letter, together with copy of Johnson & Higgins letter of May 18th to the Sterling Steamship Corporation has also been mailed to Mr. H. B. Jones, your attorney. [40]

"Thanking you for all past favors extended to the Sterling Steamship Company and to Fairbanks, Morse & Company in the past, we are,"

The attached letter reading:

"As per your instructions we have placed \$20,000.00 insurance on the hull only of this vessel, excluding the engines and Fairbanks, Morse standard equipment, attached at 9:00 A. M., Pacific Standard time, May 18, 1927, on the free of damage absolutely form as enclosed, but excluding the running down clause and on a valuation of \$100,000.00 on hull only. The loss is made payable to Fairbanks, Morse & Company and the Lake Union

Dry Dock & Machine Works as their interests may appear. * * * ”

Plaintiff's Exhibit 4 is a letter purporting to be from Bronson, Jones & Bronson to Fairbanks, Morse & Co., attention Mr. Kuppler, dated May 20, 1927, reading:

PLAINTIFF'S EXHIBIT No. 4.

“I beg to acknowledge receipt of copy of your letter of May 19th to the Lake Union Dry Dock & Machine Works regarding the M. V. ‘Ethel M. Sterling,’ and the officials of the company have today had a meeting to consider this matter.

“The contract that was entered into with the Sterling Steamship Company, as you no doubt know, provided that payment of the full contract price should be made on or before March 1st, and payment of the extras upon completion of the work and before the sailing of the vessel. It also provided for insurance to protect the account with loss payable to the Lake Union Dry Dock & Machine Works.

“In the absence of the documents, it is, of course, impossible for me to entirely understand the character of the insurance mentioned in your letter, but it seems to us that it really does not afford proper protection. In the first place, as we understand it, you have a balance of \$20,000.00 or more that is not now covered by insurance so that, in the event of loss under this policy, we would have to prorate with you and, therefore, the insurance is not adequate in amount. In addition to this,

the character of the insurance is so limited that we do not consider it affords adequate security for the claim.

“As Mr. McLean explained to you at our conference, the company has borrowed from its bank under the assurance that this balance would be paid in accordance with the contract, and it must absolutely have the funds in hand not later than June 20th to meet an obligation maturing on that date, and, even with a satisfactory policy, they would now want to be assured of its receipt within that time. If you can make an arrangement which will insure this result, [41] they will be willing to let the matter ride until that time.

“Will you kindly advise us at once whether such an arrangement can be made as they feel that the matter must be definitely disposed of immediately.”

Plaintiff's Exhibit 5—the trade acceptance, is in words and figures as follows:

PLAINTIFF'S EXHIBIT No. 5.

“No. ———.

Date June 2, 1927.

\$8000.00

On Sept, 20, 1927, pay to the order of the undersigned Eight Thousand and No. ———, Dollars, together with six per cent interest thereon from March 1, 1927, amounting to \$266.66. Value received and charge the same to the account of

LAKE UNION DRY DOCK & MACHINE
WORKS.

By OTIS CUTTING, Treasurer.

H. B. JONES, Secretary.

To Fairbanks, Morse & Co.

Seattle, Wash.

O. K.—KUPPLER.

Accepted: 6/2/1927.

Payable at _____.

(Specify Bank or Address.)

FAIRBANKS, MORSE & CO.

By C. R. MILLER, Agent." [42]

Plaintiff's Exhibit 6 purports to be a letter from Lake Union Dry Dock & Machine Works, by Otis Cutting, Treasurer, and H. B. Jones, Secretary, to the First National Bank of Seattle, attention Mr. Philbrick, dated June 2, 1927, reading:

PLAINTIFF'S EXHIBIT No. 6.

"We are handing you herewith assignment of our claim and rights against the motorship 'Ethel M. Sterling' and the Sterling Steamship Company, as owner thereof, arising out of our repairs to said vessel, on account of which there is due a balance of \$8,000.00, with interest at six per cent from March 1, 1927.

"In order to prevent our libeling said vessel before her departure from the port of Galveston on or about June 4th, where she is now loading, Fairbanks, Morse & Company, which has certain mortgage and lien claims against said vessel and, desirous of her fulfilling per present charter, has agreed to guarantee the payment of our account with six per cent interest from March 1, 1927, on or before September 20, 1927, and pursuant to such

arrangement has executed a trade acceptance. Upon payment of such trade acceptance, according to the terms thereof, or sooner, you are authorized and directed to deliver to Fairbanks, Morse & Company the said assignment of claim.

“We further understand and this arrangement is intended to insure that we shall be permitted to realize on this acceptance at any time on or after June 20, 1927, if we may desire.” [43]

Plaintiff's Exhibit 7 is the assignment, reading:

PLAINTIFF'S EXHIBIT No. 7.

“For a valuable consideration, the receipt of which is hereby acknowledged, the LAKE UNION DRY DOCK & MACHINE WORKS does hereby assign, transfer and set-over unto FAIRBANKS, MORSE & COMPANY its claim against the Motorship ‘ETHEL M. STERLING’ and the STERLING STEAMSHIP COMPANY, as owner thereof, for repairs to the said motorship heretofore made by it upon the credit of said vessel as shown in detail upon the itemized statements hereto attached, on account of which there is now due and owing as of June 1, 1927, a balance of Eight Thousand One Hundred Thirty Dollars (\$8,130.-00); and it does further assign and transfer unto the said FAIRBANKS, MORSE & COMPANY all rights of lien in admiralty or otherwise that it may have against said vessel and does authorize and empower the said FAIRBANKS, MORSE & COMPANY, as assignee hereunder, to take any and all steps as it may see fit for the enforcement

and protection of such rights and the collection of said claim, including the right to proceed, at its election, in the name of the Lake Union Dry Dock & Machine Works, but at the sole expense of it, the said FAIRBANKS, MORSE & COMPANY.

“IN WITNESS THEREOF, it has hereunto set its corporate seal and caused these presents to be duly executed by its authorized officers at Seattle, Washington, this 31st day of May, 1927.

“LAKE UNION DRY DOCK & MACHINE
WORKS.

“By (Sgd.) J. L. McLEAN,
President.

(Seal) “Attest: (Sgd.) H. B. JONES,
“Secretary.”

Plaintiff's Exhibit 8 is a telegram from A. W. Thompson, Los Angeles, Calif., to C. R. Miller, Fairbanks, Morse & Co., Seattle, dated June 1, 1927, reading:

PLAINTIFF'S EXHIBIT No. 8.

“Referring to Sterling Steamship Corporation with your knowledge of existing conditions and contact with competent legal advice matter must be left to your good judgment stop bear in mind that we are loath to increase our investment but must not under any circumstances jeopardize the sum now involved stop exhaust every effort to minimize our investment stop have you considered executing non interest bearing guarantee of

payment at four to six months as preference to immediate cash outlay." [44]

To which is attached wire of C. R. Miller to A. W. Thompson, Pacific Coast Manager, Fairbanks, Morse & Co., Los Angeles, California, dated May 31, 1927, reading:

"Refer my letter twenty first regarding Sterling Steamship account of the eleven thousand dollars libel claims mentioned Lake Union Dry Dock Company have claim eighty one hundred thirty dollars which must be paid by June twentieth vessel now Galveston loading cargo for Honolulu and Lake Union people threaten to libel June second unless we agree to pay their bill on or before June twentieth Stop we stand to lose heavily if we permit libel proceedings and I suggest that we assume Lake Union bills taking proper assignment thus permitting vessel to proceed if this meets with your approval we will advise Lake Union people accordingly otherwise if you wish further information suggest telephoning me as they must have our answer Thursday morning."

Plaintiff's Exhibit 9 is a letter dated May 21, 1927, to A. W. Thompson, Pacific Coast Manager, Fairbanks, Morse & Co., Los Angeles, Calif., from C. R. Miller, manager, reading:

PLAINTIFF'S EXHIBIT No. 9.

"Our balance sheet for the first four months was mailed to you yesterday. An analysis of this will show, according to our figures, that we have made a net profit of approximately \$4300.00 for

the period. While this is on the right side of the ledger, it seems to me that with our present rate of sales it cannot continue, unless we reduce our expenses. It is sometimes, of course, unwise to deliberately tear down an organization on account of poor business conditions which might be of a temporary nature. At the same time I cannot help but feel that unless we take some rather definite and radical action we will make a bad showing, and I hope very soon to have the benefit of your good advices.

“You have received copies of my letters to both Mr. Hovey and Mr. Manley regarding the conditions here and remembering statement you made recently in Los Angeles that Mr. Hovey wishes to release \$5,000,000.00 in the corporation, we are endeavoring to contribute our full share of this. By going over the latest financial report of the Company it seems that this reduction will amount to from 20 to 25% in both inventories and accounts. Our outstandings have been reduced some \$70,000.00 during the past 30 days. Our inventory has been reduced about \$25,000.00. We can, of course, make [45] further reductions in our inventory, as well as the accounts.

“As you will note from my letter to Mr. Hovey, the bankers here are asking their industrial customers to reduce their loans. This cannot help but have some effect upon collections. Mr. Kuppler has been able recently to devote a great deal of time to the matter of collections and is making considerable progress. There are a great number

of old accounts in the Portland territory that are in bad shape, and we will have to take some losses, but we are getting them straightened out as rapidly as possible.

“We are just now facing another embarrassment in our account with the Sterling Steamship Corporation on a contract covering two 240 H. P. engines, taken last year. The first payment of that contract, amounting to \$4500.00, will fall due June 1st of this year, but they will not be able to meet it. As a matter of fact, the Sterling Steamship Corporation is in very serious financial trouble and I doubt if they will be able to survive. They owe us about \$50,000.00, \$31,000.00 of which is secured by a preferred first mortgage on the M/S ‘Ethel M. Sterling’; \$21,000.00 covers open account and is a direct lien against the vessel. The original cost of the ‘Ethel M. Sterling’ was \$450,000.00 and the replacement cost given as \$400,000.00. In addition to our claim there is about \$11,000.00 against the boat, the most of which will have to be paid, I am informed, within the next 30 days. The vessel is now enroute to Galveston, Texas, under charter for a sulphur cargo from Galveston to Honolulu. This trip will return about \$8,000.00 and we have succeeded in having the charter assigned to us. We will, therefore, receive this money, and with our libel claims, we should be able to have assigned to us any future charters.

“This is a very good and substantial boat and undoubtedly will be a money maker. On account

of their present financial difficulties, however, we will be delayed in getting our money. The plan is now as soon as the vessel arrives in Honolulu to obtain a cargo of freight from there either to San Francisco or Seattle. In this way the vessel will be located on the West Coast, where there should be no difficulty in securing enough business not only to pay off all of its indebtedness, but to make some money besides. The vessel is of steel construction and is covered by a \$60,000.00 insurance policy, payable to us as our interest may appear.

“With further reference to Mr. Hovey’s letter, can only say that this is of very much importance to us and any suggestions you may have to offer in our operations here will be very gladly received.” [46]

Plaintiff’s Exhibit 10 is a wire dated June 1, 1927, from A. W. Thompson, Los Angeles, Calif., to C. R. Miller, Fairbanks, Morse & Co., Seattle, reading:

PLAINTIFF’S EXHIBIT No. 10.

“Does not your preferred mortgage on vessel if over two hundred gross tons protect it against libel proceedings conformity Jones Bill answer immediately.”

To which is attached wire dated June 1, 1927, from C. R. Miller to A. W. Thompson, Pacific Coast Manager, Fairbanks, Morse & Co., Los Angeles, reading:

“Lake Union Drydock claim represents unpaid

balance of their bill for repairs to vessel and engine foundations contracted prior to our mortgage and delivery of engines our attorneys advise their claim is prior to our mortgage”

Plaintiff’s Exhibit 11 purports to be a telegram from Insurance Department at Chicago, Ill., to W. R. Kuppler, care Mgr., Fairbanks, Morse & Co., Seattle, dated June 15, 1927, reading:

PLAINTIFF’S EXHIBIT No. 11.

“Referring your letter Dierks we consider necessary protection our interest Ethel M. Sterling place with Johnson & Higgins twenty thousand additional free damage absolutely on hull in name Sterling Company loss payable quote Fairbanks Morse & Co or order unquote Stop not as interest may appear Stop also make loss present hull policy payable similarly Stop also necessary write new certificate describing engines and quote equipment as per contract of unquote giving date of contract and including Inchmaree collision and property and indemnity optional coverage canceling old certificate as of this date.” [47]

Plaintiff’s Exhibit 12 purports to be a telegram from Fairbanks, Morse & Co., Seattle, Wash., to F. C. Dierks, Fairbanks, Morse & Co., at Chicago, Illinois, dated June 21, 1927, reading:

PLAINTIFF’S EXHIBIT No. 12.

“Sterling charter money held up account discrepancy in tonnage lifted at Galveston wired them

Saturday to forward check for eight thousand and fifty dollars immediately and adjust remainder soon as possible.”

Plaintiff's Exhibit 13 purports to be a telegram from C. R. Miller, Seattle, Wash., dated June 22, 1927, to A. W. Thompson, Pacific Coast Manager, Fairbanks, Morse & Co., San Francisco, reading:

PLAINTIFF'S EXHIBIT No. 13.

“Ethel Sterling now at Colon and wiring for twenty five hundred dollars for fuel and canal tolls we havent the money here and if agreeable with you suggest San Francisco office advance immediately twenty five hundred dollars to W. R. Grace and Company San Francisco for account of Sterling Steamship Corporation answer quick.”
[48]

Defendant's Exhibit “A-1,” by-laws of Fairbanks, Morse & Co., adopted March 26, A. D. 1924, together with amendments in effect on June 2, 1927, provides that the principal office of the corporation shall be in the city of Chicago, Illinois; that the business shall be managed and controlled by a Board of eleven (11) Directors; that the executive officers of the corporation shall be Chairman of the Board of Directors, a Vice-Chairman of the Board of Directors, a President, one or more Vice-Presidents, a General Manager, a Treasurer and a Secretary. Sections III and IV, of Article VI, provide:

DEFENDANT'S EXHIBIT No. "A-1."

"SECTION III. No note, acceptance or other obligation of the corporation for the payment of money (other than checks) shall be valid unless signed in the name of the corporation by the President, or in his absence or inability to sign, by a Vice-President, and countersigned in either event by the Treasurer, countersigned by the Secretary and in the event of the absence or inability of both the President and a Vice-President, then such note, acceptance or obligation may be signed in the name of the corporation by the Treasurer and countersigned by the Secretary, provided however, the Board of Directors may, by resolution, authorize any bank or banks of deposit of this corporation to accept as valid notes, acceptances or other obligations of the corporations for the payment of money (other than checks) if signed in the name of the corporation by the President or a Vice-President and countersigned by the Treasurer or Secretary, or if signed in the name of the corporation by the Treasurer and countersigned by the Secretary.

"SECTION IV. No officer, agent or employee of this corporation shall sign this corporation's name as guarantor or surety upon any bond, note, contract or other instrument of any person, firm or corporation, and any such guaranty or obligation, executed in the name of the corporation, shall be null and void, but nothing herein contained

shall preclude the proper officer from executing as herein provided, in the name of the corporation, as principal, any bond, note, contracts or other instrument, or, when authorized by a resolution of the Board of Directors of guaranteeing in the name of the corporation the payment of notes or other obligations of another corporation of which the entire capital stock is owned by this corporation." [49]

Defendant's Exhibit "A-2" is a letter from Fairbanks, Morse & Co., W. R. Kuppler, Credit Manager, to F. C. Dierks, Assistant Secretary, Fairbanks, Morse & Co., Chicago, Illinois, dated June 10, 1927, *re* Sterling Steamship Corp. Acct. Vessel "Ethel M. Sterling" formerly "Hawaii," reading:

DEFENDANT'S EXHIBIT "A-2."

"The Sterling Steamship Company owe on 7% notes secured by first preferred mortgage, \$30,800.00 principal. On maritime 7% note dated February 1st, 1927, which was originally \$24,942.62 a principal balance of \$20,678.66 with interest at 7% from April 15th, 1927.

"We have advanced to the 'Ethel M. Sterling' for wages, fuel, provisions, etc., from May, 10th, 1927, to bring the vessel from the Dutch West Indies to Galveston, a total of \$8,534.38 up to date. Vessel left Galveston, Texas, with a cargo of 1658.661 long tons of Sulphur bound thru the Panama Canal to Honolulu, Territory of Hawaii at 4:30 P. M., June 8, 1927.

"The charter price of \$5.00 per ton is payable

to us by proper assignment and accepted and we expect to collect approximately \$8300.00 covering the prepaid freight by June 16th, check will be payable directly to Fairbanks, Morse & Company, Seattle.

“It is our intention to apply \$5000.00 of this payment upon the 7% demand note of February 1st, 1927, and the balance of the demand note remaining will then be 100% libel claim against the vessel in addition to our mortgage of \$30,800.00 for the reason that this covers additional libel sales that were made by Fairbanks, Morse & Company last December and installed within the vessel ‘Ethel M. Sterling.’ The money that we have advanced during the past 30 days for wages, etc., is also a libel claim. As soon as we receive the prepaid freight check it is our intention to take it up with Messrs. Van Dyke & Thomas, our Seattle attorneys, to learn best how we shall apply this, but we believe it will be applied in accordance with above.

“The shipyard bill, Mr. Dierks, the engine, foundations, etc., amounted to approximately \$25,000.00 and it was only recently that we were compelled to guarantee balance owing Lake Union Dry Dock & Machine Works for which they demanded payment on June 20th, 1927, in full. They have a libel claim ahead of Fairbanks, Morse & Company’s mortgage and before we had delivered the engines in the hull and while they have been working 100% with us on this deal, they had certain obligations to meet and gave us advance notice that they were going to libel the ship at Galveston unless we would

guarantee to pay them by June 20th, 1927. After taking the matter up with A. W. Thompson, Pacific Coast Manager, and with the Lake Union Dry Dock & Machine Company, and their attorneys and our attorneys, we [50] got them to give us an additional three months extension beyond June 20th to make this payment, namely September 20th, 1927, whereby we might receive the benefit of any outbound freight cargo from Puget Sound, upon which the Sterling Steamship Company and their brokers are now working and it was agreed the simplest way to handle it was for Fairbanks, Morse & Company to give the Lake Union Dry Dock & Machine Company a trade acceptance for \$8,000.00 which was done, drawing 6% interest, payable September 20th, 1927, and the Lake Union Dry Dock & Machine Works have assigned to us in legal form, approved by our attorneys, their entire libel claim. So in addition to this claim in connection with the original construction and first shipment out of Seattle, approximately \$3200.00 is still payable not pressing among five creditors here and the actual cost of the vessel when completed shown by the books is \$110,000.00, carried on the corporation books shows at \$140,000.00. The vessel was built in Scotland in year 1920, of steel, original construction cost given as \$450,000.00, replacement cost at \$400,000.00, insurance valuation by the Board of Marine Underwriters at Seattle of \$200,000.00. Insurance value of hull only as per insurance policy recently mailed to Mr. Stoddard, which we got them to reduce to \$100,000.00, exclusive of the engines and

equipment. Vessel now has American Bureau class A rating, gross tonnage 1085 lumber carrying capacity about \$1,100,000 feet.

“The trip from Galveston, Texas to Honolulu back to San Francisco or Seattle is approximately 10,000 miles and it is expected that the vessel will be at Puget Sound chartered outbound again prior to her arrival during early September. This account has given us much concern and has taken considerable time of the writer, who was treasurer of the company and one of five directors, resigning of his own volition on May 13, 1927, as treasurer and as a trustee and turned back to Captain Ray Sterling stock in the \$100,000.00 corporation which was given to the undersigned to qualify as trustee and for the work put in on this deal over a period of more than one year. My reason for resigning being that if there was any stock liability in case the company got in financial difficulty there might be some question as to this liability and my own opinion being some two months ago that the company would not be able to survive and carry out their present charter agreement covering the other three vessels owned by the company, excluding the ‘Ethel M. Sterling’ in which all of our interest is represented.

“A copy of the April 30th, 1927, trial balance is enclosed and from what Captain Ray Sterling has told us during this week, it is his expectation to meet the vessel in Honolulu himself and take active charge as he or his associates have by no means given up the working out of the company diffi-

culties up to now, although I have differed with them.

“For your information would state that the Schwager-Karlen Lumber Company of Seattle had arranged with [51] Captain Sterling to carry some 30,000,000 feet of lumber from Puget Sound to Maracaibo, Venezuela, for two or more very large oil companies, which business they secured through their Philadelphia brokers. The lumber has to be unloaded at Curacao, Dutch West Indies and then redelivered from there to destination in light draft vessels not drawing over 12 feet of water over the bar into Maracaibo, Venezuela.

“For this purpose they had chartered, that is the Sterling Steamship Company, the ‘Ruby’ a boat thru Schwabacher Hardware Company of Seattle. The ‘Ruby’ got into trouble having mutiny aboard and being tied up in a foreign port the American COUNSUL would not permit them to proceed. The ‘Ruby’ left Puget Sound last October and it is still in Venezuela. In the meantime the Schwager-Karlen people purchased enough lumber locally to load the steamer ‘Bert E. Hancy’ owned by the Sterling Steamship Corporation and one of the six masted ships, which took the Schwager-Karlen money, that is their bank credit.

“These vessels left Seattle about six weeks ago and we understand are due to arrive at Curacao, Dutch West Indies about to-day. The Schwager-Karlen Lumber Company had two charter agreements with the Sterling Steamship Corporation which ran approximately \$100,000.00 covering the

prepaid freight, they withheld part of the freight amounting to approximately \$17,000.00 against the Sterling Steamship Corporation who had failed to make complete delivery at final destination on account of the mutiny trouble on 'Ruby' on former lumber shipments.

“To make matters worse, the Dexter Horton National Bank, with which Schwager-Karlen Lumber Company were doing business, and which lumber company has a very high credit on the Pacific Coast as to the payment of their bills and which bank had loaned them some \$200,000.00 or \$300,000.00 refused to loan them any more money. The situation is quite complicated between the Sterling Steamship Corporation, the Schwager-Karlen Lumber Company and the Dexter Horton National Bank, due to the fact that the Schwager-Karlen Lumber Company did not pay the balance of the prepaid freight money as per charter agreements, a \$12,000.00 loan made at the American Exchange Bank by the Sterling Steamship Corporation was not met at maturity and this has hurt considerably the credit of the Sterling Steamship Corporation.

“The steamer 'Bert E. Haney' 1500 HP and one of their six masted schooners carry approximately 4 million feet of lumber and these vessels are carried upon the Sterling Steamship Company books at \$80,000.00 were by bill of sale conveyed to the Schwager-Karlen Lumber Company to guarantee them against any loss in connection with the de-

livery of this lumber to final destination. It seems that the 'Ethel M. Sterling' powered by our two 240 twin 'C-O' engines was also not able to profitably carry the lumber from Curacao to Maracaibo, a distance of approximately 200 miles on account of being too deep and not being able to go over [52] the bar with more than 100,000 feet. Hence it was necessary for the Schwager-Karlen Lumber Company to make other arrangements to satisfy the oil companies to get this lumber transshipped from Curacao, D. W. I. in Venezuela at a higher cost than had been contracted for between the 'Ruby' and the Sterling Steamship Company, namely, \$6.00 per thousand.

"The 'Ruby' is really able to transship the lumber but on account of the crew and the captain not being able to work together Schwabacher Hardware Company of Seattle, advise us that their claim against the boat is something like \$50,000.00 at the present time. This vessel is nothing but a wooden schooner with an 80 HP gasoline engine carrying capacity about 400,000 feet.

"After this trouble started, the 'Ethel M. Sterling' having already discharged her cargo at Curacao, D. W. I., we being anxious to get the vessel out of these waters, succeeded thru Robert D. Hill, a broker, to obtain a Sulphur cargo with responsible people from Galveston to Honolulu and we got the Sterling people to take it and assign the freight to us, our thought being to get the vessel away from foreign waters into a U. S. port as quickly as pos-

sible on account of the difficulties that had made their appearance upon the horizon.

“The first payment on the engines as per mortgage notes was due June 1st, 1927, and the balance as per contract and is due over a period of three years and it seems to us and always has that the thing to do is to keep the vessel engaged at profitable work if at all possible and this we feel can be done. As to the resale value of the ‘Ethel M. Sterling’ believe that the vessel might be sold at a value of \$70,000.00 to \$75,000.00 and if the Sterling Steamship Corporation lose the other three vessels we believe that Captain Sterling will devote his efforts and energy to one vessel, the ‘Ethel M. Sterling’ and that he will pay out.

“The writer while treasurer of the company signed all the checks and knows that no money was misappropriated and that the books are in A1 shape and inasmuch as he assisted the Sterling Steamship Corporation in securing good size loans at the American Exchange Bank after personally assisting the corporation by giving the bank his personal endorsement on two occasions and a \$10,000.00 check to the Sterling Steamship Corporation at one time, felt that he had done his share and more than might be considered good with consistent business in helping the corporation when not one cent of compensation except 7% interest had been paid this year for all of this assistance and the writer concluded that if anything should happen to the corporation that he did not want to be implicated with a failing concern and thought he

could better protect Fairbanks, Morse & Company's account by resigning. Josiah Thomas, one of our local attorneys is still secretary of the company, taking that position when company was organized to help us. [53]

“This matter has been fully discussed Mr. Dierks between Mr. C. R. Miller, our Seattle manager and Mr. A. W. Thompson, Pacific Coast manager has been aware of the circumstances during the past few weeks so that you might know Mr. A. W. Thompson is fully acquainted with the facts in this case and we are sending a copy of this communication to him so that an up to date report is available for all concerned.

“Naturally when the boat goes thru the Panama Canal certain additional sums will be required, perhaps \$1500.00 and when the vessel arrives at Honolulu, which we estimate will be about July 25th, other charges will have accrued and in order to get the vessel back to Puget Sound we will be obliged, from present indications to advance further sums and for which we will not be reimbursed until outbound charters are obtained, but a broker at San Francisco and at Seattle is now working on securing a charter from Honolulu to Frisco or Puget Sound, and as to securing an outbound charter for this boat from Seattle with lumber, we know this will not be a hard matter, freight prepaid.

“You may rest assured Mr. Dierks that the writer has been giving this account a great deal of attention daily and with the dark clouds that

seem to have gone by and those ahead feel optimistic enough to think that this vessel alone will pay out within a three year period. If Captain Sterling had not purchased the steamer 'Bert E. Haney' which cost approximately \$50,000.00 to carry out his charter arrangements with the Schwager-Karlen Lumber Company and had devoted all his time and attention to this one vessel and perhaps one other ship, the company would not be in this financial difficulty by this overexpansion.

"Photo of vessel enclosed.

"Will be glad to send you further reports from time to time."

Defendant's Exhibit "A-4" is a letter dated July 7, 1927, from Cosgrove & Terhune, by Howard G. Cosgrove, to Lake Union Dry Dock & Machine Works and First National Bank, reading:

DEFENDANT'S EXHIBIT "A-4."

"Fairbanks, Morse & Co. has just learned of the execution of a document purporting to be a trade acceptance for \$8,000.00, 'together with 6% interest thereon from March 1, 1927, amounting to \$266.66,' dated June 2, 1927, drawn by Lake Union Dry Dock & Machine Works upon Fairbanks, Morse & Co., payable September 20, 1927. Said document has written on the face of it what purports to be an acceptance by 'Fairbanks, Morse & Co., by C. R. Miller, Agent.'

"Fairbanks, Morse & Co. has also just discovered that on or about said June 2, 1927, the Lake Union

Dry Dock & Machine Works executed and delivered to [54] the said C. R. Miller, a document purporting to assign to Fairbanks, Morse & Company an account of the Lake Union Dry Dock & Machine Works in the sum of \$8,130.00, against the motorship 'Ethel M. Sterling' and the Sterling Steamship Company. Said document bears date May 31, 1927.

"It appears that said purported trade acceptance is now in the possession of the above mentioned First National Bank.

"Yesterday, Fairbanks, Morse & Co., acting by and through its Vice-President and Treasurer, Mr. S. T. Kiddoo, orally notified the said First National Bank that the said C. R. Miller had no authority to accept said trade acceptance in the name of Fairbanks, Morse & Co., and that the act of the said C. R. Miller in so endorsing said acceptance and in taking said assignment was repudiated by the said Fairbanks, Morse & Co.

"Under instructions for Fairbanks, Morse & Co., we hereby notify you and each of you: that Fairbanks, Morse & Co. disavows the act of the said C. R. Miller in executing said purported trade acceptance and in taking said purported assignment; that the said C. R. Miller had no authority to execute said document and take said assignment; and that the said Fairbanks, Morse & Co. refuses to be bound thereby in any particular.

"The said purported assignment is in our possession, and we are authorized to deliver the same to the party to whom it may belong.

“Please acknowledge receipt of this letter.”

Both sides rested, and thereafter the defendant challenged the sufficiency of the evidence and moved for a dismissal. The Court denied the motion, to which an exception was taken.

Thereafter, the parties requested special findings and conclusions, and the Court, pursuant thereto, made and entered its findings and conclusions, after which judgment in favor of the plaintiff was entered.

And the defendant prays that this, its bill of exceptions, may be allowed, settled and signed.

COSGROVE & TERHUNE,
Attorneys for Defendant. [55]

The plaintiff accepts the foregoing proposed bill of exceptions without amendment, and stipulates that the same may be settled and allowed without notice.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

On this 15 day of October, 1928, in term, the foregoing exceptions are settled and allowed, and certified to contain the substance of all the evidence offered and/or introduced in said trial.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Oct. 15, 1928.

[Endorsed]: Copy of within bill of exceptions received and service of same is acknowledged this 5th day of Oct. 1928.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff. [56]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL
AND ORDER FIXING APPEAL AND
SUPERSEDEAS BOND.

To the Honorable JEREMIAH NETERER, Judge
of the Above-entitled Court:

Comes now the defendant above named, by its attorneys, and respectfully shows that on the 18th day of September, 1928, the above-entitled court entered a final judgment herein in favor of said plaintiff and against the said defendant.

Your petitioner, feeling itself aggrieved by the said judgment, has heretofore served and does herewith file this its notice of appeal from said decision and the rulings of the Court theretofore entered in the trial of said cause to the United States Circuit Court of Appeals for the Ninth Circuit, under the laws of the United States in such cases made and provided, and herewith petitions the court for an order allowing said appeal.

WHEREFORE, your petitioner prays that said appeal to said court be allowed, and that an order be made fixing the amount of security to be given by appellant conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said appeal by said Circuit Court of Appeals.

COSGROVE & TERHUNE,
Attorneys for Petitioner and Appellant. [57]

Appeal allowed this 29 day of October, 1928, and appeal and supersedeas bond fixed at \$10,000.00.

Upon the making and filing of such bond, all further proceedings shall be suspended until the determination of said appeal by the said Circuit Court of Appeals.

JEREMIAH NETERER,
Judge.

Service of the foregoing notice of appeal, petition for allowance of appeal and order fixing appeal and supersedeas bond acknowledged this 29th day of October, 1928, and appeal and supersedeas bond in the sum of \$10,000.00 is hereby approved.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 29, 1928. [58]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the defendant above named (appellant), and in connection with its appeal in this cause assigns the following errors, which it avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record:

(1) The Court erred in admitting Plaintiff's Exhibit 5. Said exhibit is in words and figures as follows, to wit:

“No. ———.

Date June 2 1927

\$8000.00

On Sept. 20, 1927, pay to the order of the undersigned Eight Thousand and No ——— Dollars, together with six per cent interest thereon from March 1, 1927, amounting to \$266.66.

Value received and charge the same to the account of

LAKE UNION DRY DOCK & MACHINE
WORKS.

By OTIS CUTTING, Treasurer.

H. B. JONES, Secretary.

To Fairbanks, Morse & Co.,
Seattle, Wash.

O. K.—KUPPLER.

Accepted: 6/2/1927.

Payable at ———.

(Specify Bank or Address.)

FAIRBANKS, MORSE & CO.

By C. R. MILLER, Agent.”

At the opening of the trial plaintiff offered Plaintiff’s Exhibit 1, to which defendant objected as follows: [59]

“I object to it as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has never been brought to the knowledge of Fairbanks, Morse & Company.”

It was admitted, with an exception allowed.

The witness Jones then testified concerning certain statements said to have been made by Kuppler, to which the defendant objected.

“on the ground that there is no showing that Mr. Kuppler had any authority of any kind whatever to make any statements.”

Jones further testified, and Plaintiff's Exhibit 3 was offered and admitted,

“notwithstanding the defendant making the same objections heretofore made.”

Upon Plaintiff's Exhibit 4 being admitted, defendant objected, saying:

“May we, without bothering the Court, counsel and witness, have these objections run to all of these documents?”

to which the Court replied:

“Same objection may run to all. Proceed.”

Plaintiff's Exhibits 5, 6 and 7 were offered together, and the Court announced concerning the same:

“The same ruling. Objection noted the same as before.

Mr. COSGROVE.—Yes, continue these same objections the same as before and exceptions to the Court's rulings.

The COURT.—Yes.”

Of the above-mentioned objections, the following is particularly applicable to Plaintiff's Exhibit 5:

“I object to it as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has never been brought to the knowledge of Fairbanks, Morse & Company.” [60]

(2) The Court erred in denying defendant's

challenge to the sufficiency of the evidence and its motion to dismiss the action.

WHEREFORE, defendant (appellant) prays that the judgment of said Court be reversed, etc.

COSGROVE & TERHUNE,
Attorneys for Defendant (Appellant).

[Endorsed]: Filed Oct. 29, 1928. [61]

[Title of Court and Cause.]

APPEAL AND SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Fairbanks, Morse & Co., a corporation of the State of Illinois, as principal, and the Fidelity and Casualty Company of New York, a corporation of the State of New York, as surety, are held and firmly bound unto Lake Union Dry Dock & Machine Works, a corporation of the State of Washington, in the sum of Ten Thousand (\$10,000.00) Dollars, to be paid to the said Lake Union Dry Dock & Machine Works, to which payment well and truly to be made we bind ourselves, our successors and assigns, by these presents.

Sealed with our seals and dated this 29th day of October, 1928.

WHEREAS, lately a regular term of the District Court of the United States for the Western District of Washington, Northern Division, sitting at Seattle, Washington, in said District, in a suit pending in said court between the said Lake Union Dry Dock & Machine Works, as plaintiff, and the

said Fairbanks, Morse & Co., as defendant, final judgment was rendered against the said Fairbanks, Morse & Co. for the sum of \$8,825.23, with interest thereon at the rate of 6% per annum from September 18, 1928, and the said defendant has served and filed (according to statute) in the Clerk's office of said court, a notice of appeal from said judgment [62] to the United States Circuit Court of Appeals for the Ninth Circuit, and has obtained a citation directed to the said Lake Union Dry Dock & Machine Works citing it to be and appear before the said United States Circuit Court of Appeals to be holden at San Francisco, in the State of California, according to law within thirty (30) days from the date hereof.

Now, the condition of the above obligation is such that if the said Fairbanks, Morse & Co. shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FAIRBANKS, MORSE & CO.,

By J. R. BENSON,

Its Attorney-in-fact.

THE FIDELITY AND CASUALTY COMPANY,

By ROBERT E. DWYER, (Seal)

Its Attorney.

O. K.—BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

The foregoing is approved as an appeal and supersedeas bond this 29 day of October, 1928.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed Oct. 29, 1928. [63]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court
for the Western District of Washington,
Northern Division:

You will please prepare and return in behalf of the defendant (appellant), according to the statutes and rules of said court, a transcript of the record herein, including:

1. Complaint.
2. Order of removal.
3. Docket entry showing filing with Clerk of District Court, complaint, petition for removal, bond, order of removal and notice to plaintiff of removal.
4. Answer.
5. Stipulation waiving jury.
6. Judgment.
7. ~~Minute entry of September 18, 1928, extending time for filing bill of exceptions.~~
(Stricken authority H. G. Cosgrove.)
8. Docket entry showing filing motion for new trial. (See Pg. 5.)

9. Minute entry showing motion for new trial denied.
10. Bill of exceptions.
11. Petition for allowance of appeal, order of allowance, and order fixing appeal and supersedeas bond.
12. Assignment of errors.
13. Bond on approval.
14. Citation.
15. Clerk's certificate.
16. This praecipe.

COSGROVE & TERHUNE,
Attorneys for Defendant (Appellant).

[Endorsed]: Filed Oct. 29, 1928. [64]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 65, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of rec-

ord and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [65]

Clerk's Fees (Act Feb. 11, 1925) for making record, certificate or return, 198 folios at 15¢	\$29.70
Certificate of Clerk to transcript of record, with seal50
<hr/>	
Total	\$30.20

I hereby certify that the above cost for preparing and certifying record, amounting to \$30.20, has been paid to me by the attorneys for appellant.

I further certify that I attach hereto and transmit herewith the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 14th day of November, 1928.

[Seal]

ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [66]

[Title of Court and Cause.]

CITATION.

To Lake Union Dry Dock & Machine Works,
GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, thirty (30) days from and after the day this citation bears date, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States of America, for the Western District of Washington, Northern Division, from the judgment signed, filed and entered in the above-entitled cause on the 18th day of September, 1928, to show cause, if any there be, why the said judgment entered against the said defendant should not be corrected, and why justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of said District Court, this 29 day of October, 1928.

[Seal]

JEREMIAH NETERER,

Judge.

Copy of within citation received and due service of same is acknowledged this 29th day of October, 1928.

BRONSON, JONES & BRONSON,

Attorneys for Plaintiff (Appellee).

[Endorsed]: Filed Oct. 29, 1928. [67]

[Endorsed]: No. 5634. United States Circuit Court of Appeals for the Ninth Circuit. Fairbanks, Morse & Co., a Corporation, Appellant, vs. Lake Union Dry Dock & Machine Works, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 22, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.